MMC Engineering Group Bhd & Anor v Wayss & Freytag (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24C(ARB)–2–05 OF 2013
MARY LIM J
11 MAY 2015

Arbitration — Award — Question of law — Plaintiff seeking courts determination of questions of law arising out of final award — Whether proper question of law formulated — Whether question of law substantially affects rights of parties — Principles applicable when reviewing awards — Whether award to be scrutinised in its entirety — Whether intervention justified — Arbitration Act 2005 s 42

The plaintiffs had formed an unincorporated joint venture to carry out the Stormwater Management and Road Tunnel ('SMART') project in Kuala Lumpur ('the project'). The project involved the construction of over 10km of tunnel. The project consisted of two sections; the north tunnel drive and the south tunnel drive. The north tunnel drive was further subdivided into two sections; section A and section B. The plaintiffs entered into a contract with the defendant for the construction of the north tunnel drive ('the contract'). The defendant failed to complete the construction within the time periods stipulated in the contract. The defendant indicated to the plaintiff sometime in January 2006 that it could only complete section B of the north tunnel drive by 31 December 2006 (instead of 1 May 2006) and complete the works by 5 March 2007 (as opposed to 15 June 2006). Between September and November 2005, the defendant gave the engineer notices of its intention to claim additional time and costs. These claims were rejected by the engineer. On 23 January 2006, the plaintiffs terminated the contract. The defendant did likewise on the same date. The parties' respective claims were referred to arbitration. The defendant's claims were premised on the allegation that the plaintiffs' termination of the contract amounted to a repudiatory breach entitling the defendant to terminate the contract (by accepting the plaintiffs' repudiation); and to demand payment of loss and damage sustained as a result of this repudiation. The plaintiffs claimed for damages for the extra costs incurred by the plaintiffs in completing the works following its termination of the contract. The plaintiff applied under s 42 of the Arbitration Act 2005 ('the Act') to refer four questions of law which were said to have arisen in the Arbitration award. The application was opposed by the defendant on the grounds that the four questions did not meet the requirements of s 42. The four questions were: (a) whether, upon a true interpretation of cl 15.2(c) of the contract, a 'reasonable excuse' under the said clause could include matters for

which the defendant was not entitled to claim for under the contract as a result of the defendant's default in failing to comply with the necessary claims procedure under the contract; (b) whether, upon a true interpretation of cl 15.2 of the contract, a 'reasonable excuse' under the said clause could extend to matters that the defendant was substantively not entitled to claim for as they arose out of the defendant's own default; (c) whether there was substantive, as opposed to merely procedural, difference between the grounds that the plaintiffs relied upon to terminate the contract; and (d) whether, upon a true construction of cl 8.3 of the contract, the engineer pursuant to the said clause was not entitled to require that the defendant put forth a revised programme that was compliant with the contractually agreed completion date in the situation where compliance with such completion date had become impossible as a result of the defendant's default.

Held, dismissing the application with costs:

(1) The court's jurisdiction under s 42 is discretionary, save for where the preconditions under s 42(1A) are not met. In order to properly invoke the discretion of the court under s 42, an applicant will have to identify or formulate the questions of law to be determined; show how these questions of law arise out of or from the arbitral award; show how its rights are substantially affected by these questions of law; and set out the grounds upon which the reference is sought (see para 21); *Lembaga Kemajuan Ikan Malaysia v WJ Construction Sdn Bhd* [2013] 5 MLJ 98.

(2) In order for a proper invocation of the court's powers under s 42, the question of law identified or presented must refer to 'a point of law in controversy' which requires the opinion, resolution or determination of this court. The question will include an error of law that involves an incorrect interpretation of the applicable law but will not include any question as to whether the award or any part of the award was supported by any evidence or any sufficient or substantial evidence; or whether the arbitral tribunal drew the correct factual inferences from the relevant primary facts (see para 27).

(3) Although the court's powers under s 42 is discretionary, this discretion is curtailed when one of the conditions for intervention of the court is not fulfilled, and that is where the plaintiffs are unable to show how the question of law substantially affects the rights of one or more of the parties as mandated by s 42(1A) (see para 37).

(4) On the assumption that proper questions of law are before the court and that these questions of law substantively affect the rights of the plaintiffs, amongst the instructive guidelines that can be drawn, in no order of importance or priority and certainly, would be: (a) the court's ever awareness of minimalistic intervention in arbitration matters; (b) that the general principle that the arbitral tribunal is both the master and final

arbiter of the facts applies and there is no reason why any broad approach should be adopted just because one is now pondering a question of law arising out of an award; (c) that the court should not look beyond the award; but where necessary, the documents and correspondence referred to in the award may be examined for context and proper appreciation; (d) that the absence of an appeal or leave mechanism advocates for a strict approach; (e) that the power under s 42 is limited and should not be lightly exercised save in clear and exceptional cases; (f) the court should first determine whether questions of law have been properly identified; (g these questions of law must arise out of the award and not from the arbitral proceedings; (h these questions of law must not be academic but be questions of practical importance requiring the opinion of the court; (i) these questions of law cannot be the same questions that were referred to the arbitral tribunal for determination; (j) the determination of the questions of law must substantially affect the rights of the parties; (k) grounds for referring these questions of law must be given; (l) the interpretation of the applicable law by the arbitral tribunal is obviously wrong; (m) public law principles are not in play in what is otherwise a private contractual dispute; and (n) the award must be viewed in its entirety in a fair and reasonable manner (see para 88).

(5) The central issue in questions (a) and (b) concerned the arbitral tribunal's interpretation of the concept of 'reasonable excuse' within cl 15.2(c) of the contract. Question (c) related to the arbitral tribunal's conclusion that there was no substantive difference between the two grounds relied on by the plaintiffs for terminating the contract; while question (d) related to the arbitral tribunal's finding that the engineer was not entitled to call for a revised programme because the defendant was not in breach of its obligations under cl 8.3 (see para 97).

(6) The award did not merit intervention of the court. The questions posed did not meet the requirements of s 42 (see para 125).

(7) Any question of law posed must be determined by reference to the whole award. Any award which is challenged must be read and scrutinised in a fair and reasonable manner, and in its entirety, in order to appreciate and understand its full meaning and implication. An award must never be read in segments, installments or without context. It was not open to the plaintiffs to read isolated parts of the award, ignoring the rest, like what the plaintiffs had done here (see para 126).

(8) From the terms of the award, it is abundantly clear that the arbitral tribunal had properly ascertained and made numerous clear findings of fact which it was duty bound to make; that it had asked the right questions and considered the right aspects of the applicable law; identified the relevant contractual provisions in order to ascertain the intention of the parties; applied those considerations to the facts as

ascertained before reaching its conclusions and decision. There was no error of law and no error in the reasoning of the arbitral tribunal. The award did not merit curial intervention at all (see para 159).

[Bahasa Malaysia summary

Plaintif-plaintif telah menubuhkan usahasama yang tidak diperbadankan untuk menjalankan Projek Pengurusan Air Banjir dan Terowong Jalan ('SMART') di Kuala Lumpur ('projek tersebut'). Projek tersebut melibatkan pembinaan atas 10 km terowong itu. Projek tersebut terdiri daripada dua seksyen; terowong panduan utara dan terowong panduan selatan. Terowong paduan utara telah dibahagikan lagi kepada dua bahagian; bahagian A dan bahagian B. Plaintif-plaintif telah memasuki kontrak dengan defendan untuk pembinaan terowong panduan utara ('kontrak tersebut'). Defendan telah gagal menyiapkan pembinaan dalam tempoh masa yang ditetapkan dalam kontrak tersebut. Defendan menyatakan kepada plaintif sekitar bulan Januari 2006 bahawa ia hanya boleh menyiapkan bahagian B di terowong panduan utara pada 31 Disember 2006 (dan bukan pada 1 Mei 2006) dan menyiapkan kerja-kerja tersebut pada 5 Mac 2007 (dan bukan pada 15 Jun 2006). Antara September dan November 2005, defendan telah memberi jurutera itu notis-notis tentang niatnya untuk menuntut masa lebih dan kos. Tuntutan-tuntutan tersebut telah ditolak oleh jurutera itu. Pada 23 Januari 2006, plaintif-plaintif telah menamatkan kontrak tersebut. Defendan juga berbuat demikian pada tarikh yang sama. Tuntutan-tuntutan pihak masing-masing telah dirujuk kepada penimbang tara. Tuntutan-tuntutan defendan berasaskan dakwaan bahawa penamatan kontrak plaintif membentuk pelanggaran penolakan yang memberi hak kepada defendan untuk menamatkan kontrak tersebut (dengan menerima penolakan plaintif-plaintif); dan untuk menuntut bayaran kehilangan dan kerugian yang dialami akibat penolakan ini. Plaintif-plaintif menuntut ganti rugi untuk kos tambahan yang ditanggung olah plainitf-plaintif dalam menyiapkan kerja-kerja tersebut berikutan penamatan kontrak tersebut. Plaintif-plaintif menggunakan s 42 Akta Timbangtara 2005 ('Akta tersebut') untuk merujuk empat soalan undang-undang yang dikatakan telah timbul dalam award timbang tara. Permohonan itu dibangkang oleh defendan atas alasan bahawa empat soalan itu tidak memenuhi keperluan s 42. Empat soalan itu adalah: (a) sama ada, setelah pentafsiran sebenar fasal 15.2(c) kontrak tersebut, 'reasonable excuse' di bawah fasal tersebut boleh termasuk perkara-perkara yang mana defendan tidak berhak kepada tuntutan di bawah kontrak tersebut akibat kegagalan defendan mematuhi prosedur tuntutan yang perlu di bawah kontrak tersebut; (b) sama ada, setelah pentafsiran sebenar fasal 15.2 kontrak tersebut, 'reasonable excuse' di bawah fasal tersebut boleh termasuk perkara-perkara yang mana defendan tidak berhak secara substantif untuk menuntut kerana ia timbul daripada kegagalan defendan sendiri; (c) sama ada terdapat perbezaan substantif, dan berbanding dengan prosedural semata-mata, antara alasan yang mana plaintif-plaintif bergantnung

kepadanya untuk menamatkan kontrak tersebut; dan (d) sama ada, setelah pentafsiran sebenar fasal 8.3. kontrak tersebut, jurutera itu menurut fasal tersebut tidak berhak untuk menghendaki bahawa defendan mengemukakan program yang disemak semula yang mana adalah patuh dengan tarikh siap yang dipersetujui dalam keadaan di mana pematuhan tarikh siap tersebut adalah mustahil akibat daripada kegagalan defendan.

Diputuskan, menolak permohonan dengan kos:

(1) Bidang kuasa mahkamah di bawah s 42 adalah atas budi bicara, kecuali di mana prasyarat di bawah s 42(1A) tidak dipatuhi. Bagi tujuan menggunakan dengan sewajarnya dibicara di mahkamah di bawah s 42, pemohon perlu mengenal pasti atau merumuskan persoalan undang-undang yang akan ditentukan; menunjukkan bagaimana persoalan undang-undang timbul daripada atau daripada award timbang tara; menunjukkan bagaimana haknya adalah berkait rapat dengan soalan-soalan undang-undang; dan menyatakan alasan-alasan yang rujukan itu dipohon (lihat perengan 21); *Lembaga Kemajuan Ikan Malaysia v WJ Construction Sdn Bhd* [2013] 5 MLJ 98.

(2) Bagi tujuan membolehkan invokasi yang sepatutnya kuasa mahkamah di bawah s 42, persoalan undang-undang yang dikenal pasti atau dikemukakan hendaklah merujuk kepada 'a point of law in controversy' yang memerlukan pendapat, ketetapan atau penentuan mahkamah ini. Soalan ini akan termasuk kesilapan undang-undang yang melibatkan tafsiran yang tidak betul undang-undang yang berkenaan tetapi tidak termasuk apa-apa soalan sama ada award atau mana-mana bahagian award itu disokong oleh apa-apa keterangan atau apa-apa keterangan yang mencukupi atau yang ketara; atau sama ada tribunal timbang tara membuat kesimpulan fakta betul dari fakta-fakta utama yang relevan (lihat perenggan 27).

(3) Walaupun kuasa mahkamah di bawah s 42 adalah atas budi bicara, budi bicara ini ini disekat apabila salah satu syarat untuk campur tangan mahkamah tidak dipenuhi, dan itu adalah di mana plaintif tidak dapat menunjukkan bagaimana persoalan undang-undang memberi kesan penting ke atas hak-hak satu atau lebih pihak seperti yang dimandatkan oleh s 42(1A) (lihat perenggan 37).

(4) Apabila andaian bahawa soalan undang-undang yang betul adalah di hadapan mahkamah dan bahawa persoalan undang-undang substantif menjejaskan hak plaintif, antara garis panduan pengajaran yang boleh diambil, dalam tidak aturan kepentingan atau keutamaan dan sudah tentu, adalah: (a) kesedaran mahkamah tentang campur tangan minimum dalam perkara-perkara timbang tara; (b) bahawa prinsip am yang mana tribunal timbang tara adalah kedua-dua ketua dan pengadil akhir mengenai fakta yang terpakai dan tidak ada sebab mengapa

mana-mana pendekatan luas perlu diguna pakai hanya kerana seseorang itu kini memikirkan persoalan undang-undang yang timbul daripada suatu award; (c) bahawa mahkamah tidak boleh melihat lebih daripada award itu; tetapi jika perlu, dokumen-dokumen dan surat-menyurat yang disebut dalam award itu boleh diperiksa untuk konteks dan penghayatan yang sepatutnya; (d) bahawa jika tiada rayuan atau mekanisme kebenaran memerlukan pendekatan yang ketat; (e) bahawa kuasa di bawah s 42 adalah terhad dan tidak patut dilaksanakan dengan kecuali dalam kes-kes yang jelas dan luar biasa; (f) mahkamah hendaklah terlebih dahulu menentukan sama ada persoalan undang-undang telah dikenal pasti dengan betul; (g) soalan-soalan undang-undang mesti timbul daripada award itu dan bukan dari prosiding timbang tara; (h) soalan-soalan undang-undang tidak perlu menjadi akademik tetapi menjadi persoalan penting yang praktikal yang memerlukan pendapat mahkamah; (i) soalan-soalan undang-undang tidak boleh menjadi soalan yang sama yang telah dirujuk kepada tribunal timbang tara untuk memperoleh penyelesaian; (j) penentuan persoalan undang-undang perlu memberi kesan besar terhadap hak-hak pihak-pihak; (k) alasan bagi merujuk soalan-soalan undang-undang mesti diberikan; (l) tafsiran undang-undang yang terpakai oleh tribunal timbang tara adalah jelas salah; (m) prinsip-prinsip undang-undang awam tidak terpakai dalam apa yang sebaliknya suatu pertikaian kontrak swasta; dan (n) award itu perlu dilihat secara menyeluruh dengan cara yang adil dan munasabah (lihat perenggan 88).

(5) Isu utama dalam soalan (a) dan (b) berkenaan tribunal timbang tara tafsiran konsep 'reasonable excuse' dalam fasal 15.2(c) kontrak tersebut. Soalan (c) yang berkaitan dengan kesimpulan tribunal timbang tara bahawa tidak ada perbezaan substantif antara kedua-dua alasan dijadikan sandaran oleh plaintif untuk menamatkan kontrak tersebut; manakala soalan (d) yang berkaitan dengan keputusan tribunal timbang tara bahawa jurutera itu tidak berhak untuk memanggil untuk program yang dikemas kini kerana defendan tidak melanggar obligasinya di bawah fasal 8.3 (lihat perenggan 97).

(6) Award itu tidak mewajarkan campur tangan mahkamah. Persoalan yang dikemukakan tidak memenuhi keperluan s 42 (lihat perenggan 125).

(7) Apa-apa persoalan undang-undang yang dikemukakan perlu ditentukan melalui rujukan kepada keseluruhan award. Apa-apa award yang dicabar perlu dibaca dan diteliti secara adil dan munasabah, dan secara keseluruhan, bagi tujuan menghayati dan memahami maksud dan kesan sepenuhnya. Suatu award tidak boleh dibaca secara bersegmen, ansuran atau tanpa konteks. Ia tidak terbuka untuk plaintif-plaintif membaca secara berasingan bahagian-bahagian award itu, tanpa menghiraukan

yang lain, sepertimana yang dilakukan oleh plaintif-plaintif di sini (lihat perenggan 126).

(8) Berdasarkan terma-terma award itu, adalah amat jelas bahawa tribunal timbang tara telah dengan betul ditentukan dan membuat banyak penemuan fakta yang jelas yang ia mempunyai kewajipan yang mengikat untuk membuat demikian; bahawa ia telah bertanyakan soalan yang betul dan mengambil kira aspek undang-undang yang terpakai yang betul; mengenal pasti peruntukan kontraktual yang berkaitan untuk menentukan niat pihak-pihak; menerima pakai pertimbangan-pertimbangan kepada fakta-fakta seperti yang ditentukan sebelum mencapai kesimpulan dan keputusannya. Tidak ada kesilapan undang-undang dan tidak ada kesilapan dalam pertimbangan tribunal timbang tara. Award itu tidak mewajarkan campur langsung (lihat perenggan 159).]]

Notes

For case on question of law, see 1(2) *Mallal's Digest* (5th Ed, 2015) para 1872.

Cases referred to

Ahong Construction (S) Pte Ltd v United Boulevard Pte Ltd [2000] 1 SLR 749, HC (refd)

Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios [1985] AC 191, HL (refd)

Athens Cape Naviera SA v Deutsche Dampfschiffahrtsgesellschaft Hansa Aktiengesellschaft, The Barenbels [1985] 1 Lloyd's Rep 528, CA (refd)

Attorney General v Shadrake Alan [2010] SGHC 327, HC (refd)

Bank Pertanian Malaysian Bhd v MCI Bio Tech Sdn Bhd [2013] 6 MLJ 537, CA (refd)

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)

Blackbear (NT) Pty Ltd v Want & Another [2013] NTSC 55, SC (refd)

Chooi Siew Cheong v Lucky Height Development Sdn Bhd & Anor [1995] 1 MLJ 513; [1995] 2 CLJ 11, FC (refd)

Dato' Abd Rahim bin Mohamad v Abdul Farish bin Rashid [2008] MLJU 652; [2009] 1 CLJ 395, CA (refd)

Dura Construction Pty Ltd v Hue Boutique Living Pty Ltd (No 3) [2012] VSC 99, SC (refd)

Exceljade Sdn Bhd v Bauer (Malaysia) Sdn Bhd (OS No 24NCC(Arb)-3-01 of 2013) (Unreported), HC (refd)

Joseph Lee Hen Shenn; ex parte Shearn Delamore & Co and Drew and Napier, Re [2012] 9 MLJ 866, HC (refd)

Finelvet AG v Vinava Shipping Co Ltd, The Chrysalis [1983] 1 WLR 1469, QBD (refd)

Ganda Edible Oils Sdn Bhd v Transgrain BV [1988] 1 MLJ 428; [1987] 2 CLJ 394, SC (refd)
Geogas SA v Trammo Gas Ltd, The Baleares [1993] 1 Lloyd's Rep 215, CA (refd)
Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd [1987] 1 MLJ 302; [1987] CLJ (Rep) 102, SC (refd)
Gold and Resources Development (NZ) Ltd v Doug Hood Ltd [2000] 3 NZLR 131, CA (refd)
Government of India v Cairns Energy India Pty Ltd & Anor [2011] 6 MLJ 441, FC (refd)
Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd [2007] 4 MLJ 201; [2007] 3 CLJ 695, FC (refd)
Hometeam Constructions Pty Ltd v Mc Cauley (2005) NSWCA 303, CA (refd)
Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Pte Ltd [2000] 2 SLR 609, CA (refd)
Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd [2004] 1 MLJ 401; [2004] 1 CLJ 743, FC (refd)
Kammins Ballroom Co Ltd v Zenith Investments (Torquay) Ltd [1971] AC 850, HL (refd)
Kershaw Mechanical Services Ltd v Kendrick Construction [2006] EWHC 727, QBD (refd)
Kosmar Villa Holidays plc v Trustees of Syndicate 1243 [2008] EWCA Civ 147, CA (refd)
Lembaga Kemajuan Ikan Malaysia v WJ Construction Sdn Bhd [2013] 5 MLJ 98, HC (refd)
Lesotho Highlands Development Authority v Impregilo SpA & Others [2006] 1 AC 221, HL (refd)
Maimunah bt Deraman (practising as an architect under the name of D' Mai Architect) v Majlis Perbandaran Kemaman [2010] MLJU 1711, HC (refd)
Majlis Amanah Rakyat v Kausar Corp Sdn Bhd [2009] MLJU 1697; [2009] 1 LNS 1766, HC (refd)
Mondial Trading Co GmbH v Gill and Duffus Zuckerhandelsgesellschaft mbH (1979) 15 BLR 118, QBD (refd)
Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd [2004] 2 SLR 494, CA (refd)
Oil Basins Ltd v BHP Billiton Ltd [2007] VSCA 255, SC (refd)
Ostime (Inspector of Taxes) v Australian Mutual Provident Society [1960] AC 459, HL (refd)
Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor [2009] 6 MLJ 293; [2009] 6 CLJ 430, FC (refd)
Pembinaan Perwira Harta Sdn Bhd v Letrikon Jaya Bina Sdn Bhd [2012] 4 MLJ 774, CA (refd)
Peregrine Systems v Steria Ltd [2004] EWHC 275, QBD (refd)
Pioneer Shipping Ltd v BTP Tioxide Ltd [1982] AC 724, HL (refd)
Rice v Great Yarmouth Borough Council [2004] App LR 6/30, CA (refd)
Shanmugan Paramsothy v Thiagarajah Pooinpatarsan & Ors [2001] 6

MLJ 305; [2001] 8 CLJ 683, HC (refd)
Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210 (refd)
The Evimera [1982] 1 Lloyd's Rep 55, QBD (refd)
Vitol SA v Norelf Ltd, The Santa Clara [1996] AC 800, 814, HL (refd)
Westminster City Council v J Jarvis & Sons Ltd [1970] 1 WLR 637, HL (refd)

Legislation referred to

Arbitration Act 1952 ss 24, 42
Arbitration Act 1996 [NZ] cll 5, 5(10), Schedule 2
Arbitration Act 1996 [UK] ss 1(c), 68, 69, 69(1), (1)(c), (2), (2)(a), (3), (3)(b), (4)
Arbitration Act 1979 [UK] ss 1(1), (2), 10, 11, 13, 15, 29, 37, 39
Arbitration Act 2001 [SG] ss 18(1), 49, (5)(b)
Arbitration Act 2005 ss 3, 8, 35, 37, 39, 41, 42, 42(1A), (2), 81, 82
Contracts Act 1950 s 57
Courts of Judicature Act 1964 s 69
International Arbitration Act 1994
Rules of Court 2012 O 69 rr 2(1)(h), 6

Chong Yee Leong (Yap Yeow Han with him) (Rahmat Lim & Partners) for the plaintiff.
Lim Chong Fong (Yatiswara Ramachandran and Cheh Keng Soon with him) (Azman Davidson & Co) for the defendant.

Mary Lim J:

INTRODUCTION

[1] This is an application under s 42 of the Arbitration Act 2005 ('Act 646') read together with O 69 r 2(1)(h) and r 6of the Rules of Court 2012 to refer four questions of law which are said to have arisen in the arbitration award made on 16 April 2013. The application is opposed with the defendant arguing that all four questions do not meet the requirements of s 42.

BACKGROUND FACTS

[2] As explained by learned counsel for the plaintiffs, the background facts can be found in the three affidavits deposed by Yeoh Hin Kok, the general manager of the joint venture between the plaintiffs and filed in support of the present application. The salient background facts are augmented by those found in the introductory remarks of the arbitral tribunal in its award, which I am taking the liberty to quote in some fair detail as it relates to a substantial

project here in the nation's capital. In any case, given that the challenge is against the award, the facts as perceived by the arbitral tribunal would be most apt.

[3] The plaintiffs had formed an unincorporated joint venture to carry out the Stormwater Management and Road Tunnel ('SMART') project in Kuala Lumpur ('the project'). The project involved the construction of over 10km of 13.30 diameter tunnel in part incorporating two levels with cross passages, intake structures and ventilation shafts. The principal purpose of this tunnel was to resolve the severe flooding faced by the city; by carrying the floodwaters under the city down to an outlet which then debouches into the lake at Desa Water Theme Park. The tunnel had a secondary function; it was also designed to mitigate the other problem frequently faced by the city's inhabitants, that is, traffic congestion. Here, the two levels of the tunnel would be utilised during periods when there is no flooding. The project consisted of two sections; the north tunnel drive and the south tunnel drive. The north tunnel drive was further subdivided into two sections; section A and section B.

[4] The plaintiffs entered into a contract dated 16 April 2003 with the defendant for the construction of the north tunnel drive ('the contract'). The conditions of contract are the 'conditions of contract for the construction, building and engineering works designed by the employer' published by the International Federation of Consulting Engineers ('FIDIC'). Pursuant to the terms of the contract, the defendant was to complete the construction of section A by 24 October 2004 and section B by 1 May 2006. It was also agreed that the time for completion of the entire north tunnel drive, that is, the works, was 15 June 2006.

[5] As it turned out, these datelines were not met. According to the arbitral tribunal, 'the works went forward in normal order albeit with some difficulties until the autumn of 2005. Starting with a major sinkhole event on the 15 September 2005, at chainage ('CH') 3280, the difficulties became serious and culminated in the collapse of a building in the vicinity of CH 3160. By the end of the year the parties were in substantial dispute'. The defendant indicated to the plaintiff sometime in January 2006 that it could only complete section B of the north tunnel drive by 31 December 2006 (instead of 1 May 2006) and complete the works by 5 March 2007 (as opposed to 15 June 2006). Between September and November 2005, the defendant gave the engineer notices of its intention to claim additional time and costs pursuant to sub-cll 4.12 and 20.1 of the general conditions of contract ('the GCC'). These claims were rejected by the engineer.

[6] On 6 January 2006, both parties respectively issued to the other, notices of their intention to terminate the contract. On 23 January 2006, the plaintiffs

terminated the contract. The defendant did likewise on the same date. The plaintiffs next proceeded to complete the balance of the works on its own on 30 May 2007.

[7] By letter dated 27 July 2006 and pursuant to cl 20.4 of the contract, the defendant referred those claims mentioned earlier and a further claim for losses and damages associated with the termination of the contract to a dispute adjudication board ('the DAB'). The parties had earlier agreed to the appointment of a sole member adjudicator on 20 March 2003. The dispute referred to the DAB pursuant to cl 20.4 was entitled 'contractor's claim Nos 8, 9 and 13. The collapse on 15-9-2005 and subsequent events leading to the Employer's wrongful Termination and Repudiation of the Contract and the contractor's termination of the contract'. The plaintiffs, too, referred a claim to the DAB on 16 August 2008 seeking to recover for its losses and damages as well as the extra costs for completing the works.

[8] Full responses were duly made by both parties before the DAB. On 14 July 2008, the DAB issued its decision on liability for the defendant's claim. The DAB's decision is said to be 'largely in favour of the defendant'. On 3 October 2008, the DAB rejected the plaintiffs' claim and issued its decision on quantum in relation to the defendant's claim.

[9] The plaintiffs filed the requisite notices of dissatisfaction with the DAB's decisions. Following this, on 17 December 2008 and in accordance with cl 20.6 of the contract, the plaintiffs filed a notice of arbitration with the Kuala Lumpur Regional Centre for Arbitration ('the KLRCA') submitting both DAB's decisions in respect of its as well as the defendant's claims to arbitration. A total of 11 claims were submitted. The court has been made to understand that only the claims within the defendant's DAB claim and the plaintiffs' DAB claim have been heard by the arbitral tribunal and this formed the subject matter of the award. The other claims are reserved.

[10] On 15 January 2009, the defendant also gave a notice of arbitration with KLRCA submitting claims made in the defendant's DAB claim and the plaintiffs' DAB claim to arbitration. The parties mutually agreed that the subject matter of both notices of arbitration were to be heard before the same arbitral tribunal.The substantive hearings were heard over two tranches; the first was held from 18–29 July 2011 while the second tranche was held from 7–8 December 2011.

[11] The award rendered on 16 April 2013 is actually the second interim award; the earlier interim award is not the subject of the present application was sought by the defendant consequent upon the determination of certain

preliminary issues. The second interim award determined the defendant's claims 8, 9 and 13 and the plaintiff's claim 9. Pursuant to separate applications under s 35 of Act 646, the parties applied for certain corrections to the calculations and figures contained in this second interim award. These applications were allowed and the arbitral tribunal delivered a corrective award on 30 May 2013. Thus, when the parties refer to the second interim award, they are in fact referring to the award, as corrected. Furthermore, this award is final in that it finally deals with the defendant's claims 8, 9 and 13; and the plaintiffs' claim 9.

[12] The arbitral tribunal which comprised three arbitrators allowed the defendant's three claims and dismissed the plaintiffs' claim 9. These claims were in fact the principal claims before the DAB. The defendant's three claims were effectively treated by both parties as a single claim. This was approved by the arbitral tribunal which saw it as 'a convenient way to deal with them'; and this 'route' was accordingly adopted in the arbitral proceedings. For ease of reference and for convenience, this court shall follow suit.

[13] In substance, the defendant's three claims were premised on the allegation that the plaintiffs' termination of the contract on the grounds mentioned in letters dated 6 January 2006 and 23 January 2006 amounted to a repudiatory breach entitling the defendant to terminate the contract (by accepting the plaintiffs' repudiation); and to demand payment of loss and damage (the sum of RM125,121,159.36 and 103 days extension of time) sustained as a result of this repudiation.There were also additional and alternative pleas put forth by the defendant including contentions that the defendant's termination under sub-cll 16.2(c) and (d) of the contract was valid and justified by the plaintiffs' failure to perform other obligations under the contract; those obligations related to the plaintiff's non-disclosure of factual soil information which it had in its possession at the material time and for which the defendant claimed it was therefore entitled to payment in accordance with sub-cl 16.4 of the contract.

[14] In so far as the plaintiffs' claim is concerned, that is claim 9, the plaintiffs claimed a sum of RM140,604,354.44 as damages for, amongst others, the extra costs incurred by the plaintiffs in completing the works following its termination of the contract on 23 January 2006. It was the plaintiffs' claim that the termination was due to the defendant's failure to, inter alia, comply with the notice to correct issued by the engineer under cl 15.1 of the contract. In this notice, the defendant was required to submit a revised programmed to complete the works in accordance with the contract.

[15] The plaintiffs also alleged that the defendant had failed to proceed with the works in accordance with cl 8, in particular, that the defendant had failed

to proceed with the works with due expedition and without delay as required under cl 8.1; and that the defendant had failed to submit a revised programme in compliance with the contract as required by the engineer to do so in accordance with cl 8.3 of the contract.

THE APPLICABLE TEST UNDER SECTION 42

[16] Section 42 of the Arbitration Act 2005 is peculiar to the Malaysian arbitration scene. This recourse to the courts is available in all domestic arbitrations unless the parties have specifically opted out of its operation; and unavailable to international arbitrations unless the parties have specifically opted in to its application. This is clear from the provisions of s 3. Section 42 was amended in 2011 to introduce sub-s 42(1A).

[17] Section 42 now reads as follow:

> 42 Reference on questions of law
>
> (1) Any party may refer to the High Court any question of law arising out of an award.
>
> (1A) The High Court shall dismiss a reference made under subsection (1) unless the question of law substantially affects the rights of one or more of the parties.
>
> (2) A reference shall be filed within forty-two days of the publication and receipt of the award, and shall identify the question of law to be determined and state the grounds on which the reference is sought.
>
> (3) The High Court may order the arbitral tribunal to state the reasons for its award where the award:
>
> (a) does not contain the arbitral tribunal's reasons; or
>
> (b) does not set out the arbitral tribunal's reasons in sufficient detail.
>
> (4) The High Court may, on the determination of a reference:
>
> (a) confirm the award;
>
> (b) vary the award;
>
> (c) remit the award in whole or in part, together with the High Court's determination on the question of law to the arbitral tribunal for reconsideration; or
>
> (d) set aside the award, in whole or in part.

[18] The recourse of referring questions of law to court under s 42 is not unusual as other jurisdictions do similarly allow questions of law to be posed but, using an appeals mechanism. In fact, it would appear that Malaysia is the only jurisdiction that uses this mechanism, and it is in this sense, that I would

say that s 42 is peculiar to Malaysia. Whilst the Arbitration Act 2005 (Act 646) may not have provided for a filter or an appeal mechanism where leave of the court must first be procured before the court will proceed to determine a question of law arising out of or from an award, and where the *Nema-Antaios* guidelines (*Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724 ('the Nema') and principles in *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1985] AC 191 ('the Antaios')) would be relevant; but given that the court's intervention is sought for the same reasons, which is, a complaint of a question of law arising out of or from an award, it is fair to say that the general approach in those jurisdictions using that appeals procedure should not be totally disregarded or worse, ignored outright.

[19] On the contrary, it makes good commercial sense to find some consistency in this area of law for the usual reasons of business efficacy and confidence that are good for and promotes arbitration, both domestic and international. Similar views were expressed by Ariff J (as he then was) in *Majlis Amanah Rakyat v Kausar Corp Sdn Bhd* [2009] MLJU 1697; [2009] 1 LNS 1766. His Lordship had also conducted a comparative exercise as I do here before remarking that 'it is good policy and desirable commercial comity to ensure that our law does not depart significantly from international norms and practices particularly in relation to common law jurisdictions'.

[20] In any case, it will appear that these guidelines on the granting of leave under the old s 1(2) Arbitration Act 1979 of the UK may be of limited application since the 1996 UK Arbitration Act now has its own preconditions — see sub-s 69(2), (3) and (4). I will deal with these in greater detail later. This court will therefore refer to case law from those jurisdictions which allow recourse to court on a question of law through an appeals procedure mindful that the statutory provisions are different. Singapore is one such jurisdiction and it applies model law; others being the United Kingdom and New Zealand.

[21] The court's jurisdiction under s 42 is discretionary, save for where the preconditions under sub-s 42(1A) are not met. In *Lembaga Kemajuan Ikan Malaysia v WJ Construction Sdn Bhd* [2013] 5 MLJ 98, I had expressed the view that in order to properly invoke the discretion of the court under s 42, an applicant will have to identify or formulate the questions of law to be determined; show how these questions of law arise out of or from the arbitral award; show how its rights are substantially affected by these questions of law; and set out the grounds upon which the reference is sought. These requirements must be met before the court will even begin to address and determine the questions of law presented. In a sense, these pre-qualifications and conditions are thresholds that any applicant must cross and cross successfully before s 42 is properly invoked.

[22] To start with, what precisely is a question of law? The term is not defined in Act 646. But, it is defined under New Zealand's Arbitration Act 1996. Sub-clause 5(10) of Schedule 2 to that the Act defines a 'question of law' as follow:

> (10) For the purposes of this clause, question of law:
>
> (a) includes an error of law that involves an incorrect interpretation of the applicable law (whether or not the error appears on the record of the decision); but
>
> (b) does not include any question as to whether:
>
> (i) the award or any part of the award was supported by any evidence or any sufficient or substantial evidence; and
>
> (ii) the arbitral tribunal drew the correct factual inferences from the relevant primary facts.

[23] This definition is not exhaustive, seeming to prefer some retention or measure of discretion on the courts. What may be gathered from para 5(10)(a) is that the error may or may not be apparent from the record, which means some exploration of the award may be called for. However, there is some curtailment of the extent of exploration that the courts may embark on. In examining the award, the sufficiency of evidence is not for the courts' to evaluate so long as the arbitral tribunal had drawn correct factual inferences from the relevant primary facts.

[24] The phrase 'question of law' is also not defined under the Singapore Arbitration Act 2001 (Chapter 10), specific legislation in Singapore dealing with domestic arbitrations but case laws have shed some light and it will be helpful to have a look at them. In the case of *Ahong Construction (S) Pte Ltd v United Boulevard Pte Ltd* [2000] 1 SLR 749 GP Selvam JC defined a question of law in the following terms:

> A question of law means a point of law in controversy which has to be resolved after opposing views and arguments have been considered. It is a matter of substance the determination of which will decide the rights between the parties. The point of law must substantially affect the rights of one or more of the parties to the arbitration. If the point of law is settled and not something novel and it is contended that the arbitrator made an error in the application of the law there lies no appeal against that error for there is no question of law which calls for an opinion of the court. An application for leave to appeal on the ground that the appeal invokes a question of law must therefore clearly present the question of law on which the court's opinion is sought and should also show that it concerns a term of the contract or an event which is not a one-off term or event: see The Nema; *Pioneer Shipping v BTP Tioxide* [1982] AC 724.

[25] This view was subsequently approved by the Court of Appeal in

Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd [2004] 2 SLR 494, at p 499 with the Court of Appeal adding that 'as a preliminary point, it is essential to delineate between a 'question of law' and an 'error of law', for the former confers jurisdiction on a court to grant leave to appeal against an arbitration award while the latter, in itself, does not'. The Court of Appeal further opined that:

> To our mind, a 'question of law' must necessarily be a finding which the parties dispute, that requires the guidance of the court to resolve. Where an arbitrator does not apply a principle of law correctly, that failure is a mere 'error of law' (but more explicitly, an erroneous application of law) which does not entitle an aggrieved party to appeal.

[26] It is the view of this court that these interpretations and the general principles in sub-cl 5(10) of Schedule 2 of the New Zealand Act are helpful in determining what a question of law is under our s 42.

[27] In order for a proper invocation of the court's powers under s 42, the question of law identified or presented must refer to 'a point of law in controversy' which requires the opinion, resolution or determination of this court. Such opinion or determination can only be arrived at 'after opposing views and arguments have been considered'. The question will include an error of law that involves an incorrect interpretation of the applicable law but will not include any question as to whether the award or any part of the award was supported by any evidence or any sufficient or substantial evidence; or whether the arbitral tribunal drew the correct factual inferences from the relevant primary facts.

[28] At the same time, the identified question of law must be a real and legitimate question of law and not a question of fact 'dressed up' as a question of law. Lord Steyn reiterated in *Geogas SA v Trammo Gas Ltd, The Baleares* [1993] 1 Lloyd's Rep 215, at p 228, what is described as the 'cardinal rule' when dealing with arbitral awards; and that is that 'the arbitrators are the master of the facts' and that 'their findings of fact are conclusive'. The courts must be 'constantly vigilant' of the 'catalogue of challenges to arbitrators' findings of fact', ensuring that attempts to circumvent this rule by dressing up questions of fact as questions of law 'are carefully identified and firmly discouraged'. It is irrelevant how obviously wrong the findings of facts are (except where it is truly beyond rational argument), or the scale of the financial consequences of the mistake of fact might be. Lord Steyn opined that this was '… an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact'.

[29] Those views were expressed by the Court of Appeal hearing an appeal against the grant of leave to hear an appeal against an arbitral award under our comparable s 42; and I see no reason why it should be any different for a s 42 reference. Similar views were also expressed in the New Zealand decision of *Gold and Resources Development (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 131 which applies an appeal procedure for a question of law arising from an award with a leave mechanism before the court will entertain the appeal.

[30] The plaintiffs must furthermore explain the grounds for their grievance, the basis for their claims. Here, the relevant factual findings and legal analysis that form the grounds must be pointed out as the questions of law could not possibly exist on their own, but necessarily emanate from some findings of fact or analysis of the applicable legal principles. Since the arbitral tribunal's findings of fact must be accepted almost unconditionally, the questions of law posed cannot be allowed to be circuitous challenges of those findings of facts although some jurisdictions have expressed concerns over so-called 'findings of facts' where there was no evidence in the first place — see for instance *Athens Cape Naviera SA v Deutsche Dampfschiffahrtsgesellschaft Hansa Aktiengesellschaft, The Barenbels* [1985] 1 Lloyd's Rep 528; *Mondial Trading Co GmbH v Gill and Duffus Zuckerhandelsgesellschaft mbH* (1979) 15 BLR 118; and *Oil Basins Ltd v BHP Billiton Ltd* [2007] VSCA 255. In this respect, New Zealand's definition of what a question of law is both beneficial and useful as it is consistent with the general approach that the award must be read and considered as a whole and in a fair and reasonable manner; and not with microscopic examination looking for minutiae differences or faults.

[31] Hence, the questions before the court now must necessarily be questions of law which emanate from the award and not, from the arbitration or the arbitral proceedings. For that, the jurisdiction is to be found under s 41 of the Arbitration Act 2005which allows the courts to examine matters arising during the arbitral proceedings.

[32] In addition, the questions of law now identified for determination of this court cannot be the same or be rehatched questions that the parties had already referred to arbitration in the first place. This is apparent from a reading of sub-s 42(2) which is couched in mandatory language requiring the applicant or the plaintiffs to identify the question of law 'to be determined', that is, to be determined by the court in the present proceedings. This is regardless of the court's powers to, inter alia, remit the award in whole or in part, together with the court's determination on the question of law to the arbitral tribunal for reconsideration. I do not believe the question of law can include the specific question that was posed for determination by the arbitral tribunal in the first instance. In that scenario, the question, albeit a question of law, remains one

which the court ought not to intervene and determine. The views expressed in *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210 and *Government of India v Cairns Energy India Pty Ltd & Anor* [2011] 6 MLJ 441 remain good law in this respect.

[33] The plaintiffs have urged this court to allow the same questions of law to be determined here suggesting that this was indicated by the Federal Court in *Government of India v Cairns Energy India Pty Ltd & Anor*. While the Federal Court had declined to depart from the existing test, it hinted that it might do so where the award is tainted with illegality. At p 425, the Federal Court said:

> ... even where a specific reference has been made to the arbitrator, if the award subsequently made is tainted with illegality, it can be set aside by the courts on the ground that an error of law had been committed ...

[34] Illegality would include instances where the arbitral tribunal had come to its decision on inadmissible evidence or on principles of construction which the law does not countenance as expressed in *Ganda Edible Oils Sdn Bhd v Transgrain BV* [1988] 1 MLJ 428; [1987] 2 CLJ 394. I do not find it necessary to express any opinion on this as the questions framed here, if they pass muster as proper questions of law, were not questions referred to the arbitral tribunal in the first place.

[35] This is quite different from the position under the UK Arbitration Act 1996. Paragraph 69(3)(b) of the UK Arbitration Act 1996 provides that leave to appeal shall be given only if the court is satisfied, inter alia, that 'the question is one which the tribunal was asked to determine'. This is similarly the case with the Singapore Arbitration Act 2002 (Chapter 10). Section 49(5)(b) of that Act similarly provides that leave to appeal shall be given only if the court, inter alia, is satisfied that the question is one which the arbitral tribunal was asked to determine.

[36] To my mind, this single but important distinguishing factor is what sets our s 42 apart from the other jurisdictions. When the reasoning process test as opined by Mustill J (as His Lordship then was) in *Finelvet AG v Vinava Shipping Co Ltd, The Chrysalis* [1983] 1 WLR 1469 is examined, it is the existence or availability of an appeal on a question of law already earlier referred to the arbitral tribunal that makes that test appropriate when hearing an appeal against the decision of the arbitral tribunal on the question of law referred. I shall deal with this aspect in greater detail later.

[37] Although the court's powers under s 42 is discretionary, this discretion is curtailed when one of the conditions for intervention of the court is not fulfilled, and that is where the plaintiffs are unable to show how the question of law substantially affects the rights of one or more of the parties as mandated by

sub-s 42(1A). The term 'parties' here must necessarily and logically refer to or include the plaintiffs; otherwise it makes no practical sense for the plaintiffs to seek the intervention of the court. This condition of showing substantial rights being affected prevails in both the s 42 and model law regimes; including those of the UK, Singapore and New Zealand upon which I have based my comparisons.

[38] Again, there is no definition on this requirement. There is however, some indication of what the term may include in the decision of *Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Pte Ltd* [2000] 2 SLR 609. In that case, the Singapore Court of Appeal accepted the interpretation of the expression 'substantially affect the rights' by Lord Denning in the Court of Appeal in *'the Nema'* [1980] QB 547, at p 564; that it refers to 'a point of practical importance — not an academic point — nor a minor point'.

[39] This decision was followed in *Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd* where the Court of Appeal recognised that '... the question as to how 'substantially' was to be measured, remained. Whether a claim was substantial or not can sometimes be considered in absolute terms. We could arbitrarily say that $10 is insubstantial. There will come a point where one might not be able to declare confidently that the given sum is substantial or otherwise, without considering the context of the claim ... In *The Evimera* [1982] 1 Lloyd's Rep 55 , the court was of the view that the claim for $20,000 was not substantial in the context of that case ... We agree with the court in *The Evimera* that the granting of leave is a discretionary exercise and as such, is not governed by rules, provided that the statutory criteria are satisfied ... The question of substantiality is largely a matter of discretion at case'. I am of the view that this is interpretation holds equally true for s 42 which has the same requirement. I am also of the view that there must be evidence presented or at the very least a claim or an assertion in the cause papers including the affidavits filed in support to the effect that the applicant's rights have been affected substantially by the arbitration award; and an explanation as to how those rights are affected substantially.

[40] Where this criteria is not met, the court is obliged to dismiss the reference as sub-s 42(1A) uses the term 'shall' as opposed to the word 'may' which appears elsewhere in s 42. I do not see any element of discretion in this regard, especially since sub-s 42(1A) was introduced by way of an amendment in 2011.

[41] Further, it is only after all these pre-qualifications or conditions have been met will the court then proceed to determine those questions of law. When determining this reference, the court is necessarily directing its focus and attention to the four corners of the award and nothing more; although this may

extend to the documents or correspondence that were referred to or mentioned in the award. I do not believe that one should be inflexible here as the court may sometimes need to examine the particular document or correspondence referred to in the award in order to determine the question of law posed. Similar views can be found in *Kershaw Mechanical Services Ltd v Kendrick Construction* [2006] EWHC 727.

[42] In determining those questions of law that have qualified or passed scrutiny, the ensuing issue is how is the court to make its determination or render its opinion on those questions?

[43] In their first set of submissions, the parties had differed in the views on the applicable test for a challenge under s 42. The plaintiffs relied on the 'error of law on the face of the award' test applied in *Majlis Amanah Rakyat v Kausar Corp Sdn Bhd* [2009] MLJU 1697; [2009] 1 LNS 1766 and several other decisions including Lembaga *Kemajuan Ikan Malaysia v WJ Construction Sdn Bhd*. It was the plaintiffs' case that the award was wrong and must be set aside as it had thrown up these questions of law which must be determined in plaintiffs' favour.

[44] The defendant, on the other hand, urged this court to reconsider and discard the 'error of law on the face of the record' testas it was relevant only for challenges under s 24 of the old Arbitration Act 1952; and not, for challenges under the present s 42 of the old Arbitration Act 1952 in view of the clear language of s 42 itself. In fact, Ariff J in *Majlis Amanah Rakyat v Kausar Corporation* had followed the view expressed by Vohrah J in *Shanmugan Paramsothy v Thiagarajah Pooinpatarsan & Ors* [2001] 6 MLJ 305 ; [2001] 8 CLJ 683 that the 'error of law on the face of the award' test on the basis that the test was so entrenched under Malaysian law that it could only be displaced by an express statutory provision. The defendant submitted that the case of *Shanmugan Paramsothy* should no longer be followed as it was a case decided before the Arbitration Act 2005 was passedand where there were no comparable legal provisions such as that found in the current s 8. In other words, it had been displaced by statute.

[45] In its place, the defendant advocated the process of reasoning test provided by Mustill J in *Finelvet AG v Vinava Shipping Co Ltd, The Chrysalis* [1983] 1 WLR 1469. According to learned counsel for the defendant, the deliberate use of the words 'question of law' as opposed to 'error of law' in s 42 was clear indication of the intention of the legislature to depart from the then prevailing common law principles. It was also suggested that this test would allow Malaysian legal jurisprudence to develop along similar lines as other leading Commonwealth jurisdictions who apply the concept of 'question of law' even though those jurisdictions do not have a similar scheme as our s 42.

Such approach is said to 'ensure a level of commercial uniformity, predictability and certainty in cases of challenges against arbitration awards'.

[46] According to learned counsel these arguments found favour with Nallini J in *Exceljade Sdn Bhd v Bauer (Malaysia) Sdn Bhd* (OS No 24NCC(Arb)-3-01 of 2013). In that decision, Her Ladyship rejected the error of law on the face of the award test when confronted with an application under s 42, opting for Mustill J's reasoning process in *The Chrysalis*.

[47] Because this court had earlier expressed views on this aspect in the case of *Lembaga Kemajuan Ikan Malaysia v WJ Construction Sdn Bhd*, the parties were invited to further address the court on whether it was open to the court to depart from its own earlier views; whether there was any distinction between the terms 'refer' as appearing in s 42 and 'appeal' as found in sub-s 1(2) of the UK Arbitration Act 1979 and sub-s 69(1) of the UK Arbitration Act 1996; and, the origins of s 42 and how it is to be applied in the context of Part III of Act 646 and its relationship with ss 37 and 39 in Part II Act 646. Having had the benefit of the parties' further research and submissions, this is the court's views on each of those related issues.

[48] Before pressing ahead, perhaps it may be appropriate to understand what it is that Lord Mustill had expressed in *The Chrysalis*. At p 1474, His Lordship had explained the reasoning process in these terms:

> Starting therefore with the proposition that the court is concerned to decide, on the hearing of the appeal, whether the award can be shown to be wrong in law, how is this question to be tackled? In a case such as the present, the answer is to be found by dividing the arbitrator's process of reasoning into three stages: (1) The arbitrator ascertains the facts. This process includes the making of findings on any facts which are in dispute. (2) The arbitrator ascertains the law. This process comprises not only the identification of all material rules of statute and common law. But also the identification and interpretation of the relevant parts of the contract, and the identification of those facts which must be taken into account when the decision is reached. (3) In the light of the facts and the law so ascertained, the arbitrator reaches his decision.
>
> In some cases, stage (3) will be purely mechanical. Once the law is correctly ascertained, the decision follows inevitably from the application of it to the facts found. In other instances, however, stage (3) involves an element of judgment on the part of the arbitrator. There is no uniquely 'right' answer to be derived from marrying the facts and the law, merely a choice of answers, none of which can be described as wrong.
>
> Stage (2) of the process is the proper subject matter of an appeal under the Act of 1979. In some cases an error of law can be demonstrated by studying the way in which the arbitrator has stated the law in his reasons. It is, however, also possible to infer an error of law in those cases where a correct application of the law to the facts found would lead inevitably to one answer, whereas the arbitrator has arrived at

> another; and this can be so even if the arbitrator has stated the law in his reasons in an manner which appears to be correct, for the Court is then driven to assume that he not properly understand the principles which he had stated.
>
> Whether stage (3) can never be the proper subject of an appeal, in those cases where the making of the decision does not follow automatically from the ascertainment of the facts and the law, is not a matter upon which it is necessary to express a view in the present case. *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724 and *Kodros Shipping Corporation v Empreso Cubana de Fletes(No 2)* [1983] 1 AC 736, show that where the issue is one of commercial frustration, the Court will not intervene, save only to the extent that it will have to form its own view, in order to see whether the arbitrator's decision is out of conformity with the only correct answer or (as the case may be) lies outside the range of correct answers. This is part of the process of investigating whether the arbitrator has gone wrong at the second stage. But once the court has concluded that a tribunal which correctly understood the law could have arrived at the same answer as the one reached by the arbitrator, the fact that the individual judge himself would have come to a different conclusion is no ground for disturbing the award.

[49] It would appear that a question of law is properly framed in relation to the second stage of the reasoning process. That must mean that the question has to be based on or related to some factual or legal premises or analysis in the award. Otherwise, the question of law cannot be said to be a question which arises out of the award. This is not to say that other accepted findings of fact or unchallenged legal analysis can be ignored or contradicted. What this means is that the question identified must be viewed in the entirety of the award as the intervention of the court is somewhat limited.

[50] Returning now to the matters that this court had posed to the parties. First, on the matter of whether the court is entitled to depart from its own earlier decision. The answer must be obvious; certainly where my own earlier decision has already been overruled by an appellate court. In any case, the doctrine of stare decisis or binding precedent does not bind me to my own prevision decisions for this court 'must at least be permitted to strike off in the right direction' as soon as the court finds itself 'going in the wrong direction' — see *Joseph Lee Hen Shenn; ex parte Shearn Delamore & Co and Drew and Napier, Re* [2012] 9 MLJ 866 citing Lord Denning in *Ostime (Inspector of Taxes) v Australian Mutual Provident Society* [1960] AC 459, 489; and *Attorney General v Shadrake Alan* [2010] SGHC 327, at p 452.

[51] *Apropos*, having relooked at my earlier decision in *Lembaga Kemajuan Ikan*, it was not so much a case of whether or not this court had concurredor disagreed with Ariff J (as he then was) in *Maimunah bt Deraman (practising as an architect under the name of D' Mai Architect) v Majlis Perbandaran Kemaman* [2010] MLJU 1711. This court merely remarked that the 'principles envisaged are akin to 'error of law on the face of the award'; and those remarks were made

in the context of the approach that the court should adopt when dealing with a reference under s 42; that the courts should apply its already restrictive or limited jurisdiction in arbitration matters only in clear and exceptional cases. I would maintain that approach even for the present circumstances and even where different principles are advocated.

[52] In any case, there is still room left for the continued application of the error of law on the face of the award test. The test has its roots under common law. The preponderance of the test led to deliberate legislative intervention in other jurisdictions while that is not the case here. I do not find any express statutory provision excluding that test quite unlike the position in the United Kingdom. For example, in the UK 1979 Arbitration Act, s 1 deals with 'judicial review of arbitration awards', and sub-s 1(1) expressly states:

> 1(1) In the Arbitration Act 1950 (in this Act referred to as 'the principal Act') section 21 (statement of case for a decision of the High Court) shall cease to have effect and, without prejudice to the right of appeal conferred by subsection (2) below, the High Court shall not have jurisdiction to set aside or remit an award on an arbitration agreement on the ground of errors of fact or law on the face of the award.

[53] This statutory policy is maintained in the UK 1996 Arbitration Act in sub-s 81(2) which reads as follow:

> Nothing in this Act shall be construed as reviving any jurisdiction of the Court to set aside or remit an award on the ground of errors of fact or law on the face of the award.

[54] There are no comparable provisions in our Act 646 that either mirrors or comes close to the clear express language of sub-s 1(1) in the 1979 Act or sub-s 81(2) in the 1996 Act. I do not believe there is any room for making any necessary inference either. Although this court may be prepared to bring this area of law alongside the mainstream approaches under model law, I am reminded that the courts are only interpreters and not legislators of the law. Even in the case of the United Kingdom, the court's practice and approach changed because of legislative intervention.

[55] The positions in New Zealand and Singapore are also different from our s 42. In New Zealand, the appeals procedure on a question of law arising from an award requires leave to be first procured before the appeal can properly be heard. Leave, however, is unnecessary under cl 5 of Schedule 2 of the New Zealand's 1996 Arbitration Act where the parties have consensually agreed,either before or after the making of the award, to this right of appeal.

[56] Again, Act 646 does not have similar provisions nor can it be suggested that there is such intent from reading Act 646 as a whole. As expressed earlier,

there is no express provision on the removal of jurisdiction and power on ground of error of law on the face of the award.

[57] Be that as it may, the fact that the test is one of error on the face of the award does not in the least mean that the challenge is one under public law or that public law concepts of jurisdiction or errors of law are imported into what is nothing else but a private law matter concerning two contracting parties and their contractual dispute. Far from it; and one cannot be distracted by the simple use of the term 'error of law'.

[58] Learned counsel for the plaintiffs has invited this court to refer to Singapore's experience for some guidance as to how the courts there have dealt with questions of law. Singapore has separate legislation for its arbitration regimes; the International Arbitration Act 1994 (Chapter 143A) deals with international arbitrations whereas the Arbitration Act 2001 deals with domestic arbitration.

[59] In its 1993 report of a review of arbitration laws and specifically on whether the distinction between 'domestic' and 'international' arbitrations should be maintained, the Singapore Law Reform Committee had indicated that:

> As a matter of policy, ... the Committee considered that a closer involvement by the courts in domestic arbitrations is desirable, both for the development of domestic commercial and legal practice, and for a closer supervision of decisions that may affect weaker domestic parties. It is appropriate that the courts be able to reflect public policy considerations and national interests involved in purely domestic disputes.

[60] Although the committee had a 'preference for commercial parties the freedom to agree to have disputes dealt with according to international arbitration regime (albeit with a lesser degree of curial intervention)', it noted at para 16, the view that:

> ... the courts should be more closely involved in arbitration disputes which are domestic in character (both in order to protect the weaker parties and for the purposes of being involved in the evolution of decisions that concern domestic law and practice).

[61] In 2001, the Law Reform and Revision Division of the Attorney General's Chambers of Singapore undertook a review of arbitration laws in Singapore. In its report LRRD No 3 of 2001 (para 2.38.1), it agreed with the Singapore Law Reform Committee's views and accepted that the right of appeal to the courts in domestic arbitration regime should not be abolished but be retained as a 'limited degree of review by the court is consistent with the

parties' desire to have the matter decided in accordance with the law as properly understood and as applied in Singapore.

[62] Section 49 of the Arbitration Act 2001 in Singapore is similar to s 81 Arbitration Act 2005 of the UK. It allows leave only where, inter alia, the court is satisfied that the question before the court is one which the arbitral tribunal was asked to determine. Then, on the basis of the arbitral tribunal's finding facts in the award, the decision of the arbitral tribunal on the question is obviously wrong; or the question is one of general public importance and the decision of the arbitral tribunal is at least open to serious doubt; and despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine that question.

[63] I pause here to observe that this recourse of posing questions of law to the court is available to both international and domestic arbitrations under the UK and New Zealand arbitration regimes whereas it is only available to domestic arbitrations in the case of Singapore. The reason for curial intervention by the court appears to differ between jurisdictions.

[64] Regardless, the conditions under Singapore's s 49 allow for the reasoning tests propounded in *The Chrysalis*. It is furthermore important to observe that like the United Kingdom, Singapore has also removed the common law test of intervention on the existence of an error on the face of the award in 1980 through sub-s 18(1) of the Arbitration Act 2001.

[65] All this brings me to the conclusion that the statutory positions in these other jurisdictions are materially different from the Malaysian context. While I am more than prepared to subscribe to consistency and uniformity in arbitrations, the fact that Parliament must have been aware of the prevailing practice and procedure in other legislations at the time Act 646 was enacted, it has nevertheless seen fit not to follow those other regimes is telling and the intention of Parliament must be heeded. I do not believe the amendment in sub-s (1A) is sufficient to introduce and adopt the jurisprudence of other jurisdictions which applyan appeal and leave mechanism, especially wholesale. This amendment is vastly different from s 81 of the UK Act 1996 and sub-s 18(1) and s 49 of Singapore's Arbitration Act 2001.

[66] The next matter concerns the jurisdiction of the court under s 42 as compared to sub-s 1(2)Arbitration Act 1979 of the UK and later s 69 of the UK Arbitration Act 1996; whether there was any difference in the two terms, 'appeal' and 'refer'.

[67] The plaintiffs have urged the court to construe 'refer' in similar fashion to an 'appeal citing the authors of the Arbitration Act 2005, UNICTRAL

model law as applied in Malaysia, 2007 as saying at p 201 that they '… do not attach any significance to the fact that the word 'appeal' has not been used. It provides for an appeal in all but name.' Given this position, the plaintiffs have found the approach adopted by the UK courts, especially in *The Chrysalis* 'very persuasive' and have thereby urged this court to adopt that same approach.

[68] The defendant could not find any assistance from the *Hansard* as to why this mode was preferred over the appeal process which is found not only under the UK Arbitration Act but also in cl 5 of Sch 2 to the New Zealand Arbitration Act 1996 and s 49 Arbitration Act 2001 of the Singapore (Cap 10). It suggested that Parliament could have used the term 'refer' deliberately to avoid the court treating the application under its appellate powers conferred under s 69 of the Courts of Judicature Act 1964. This power was explained in *Bank Pertanian Malaysian Bhd v MCI Bio Tech Sdn Bhd* [2013] 6 MLJ 537 to allow the appellate court to intervene and remedy the injustice where it has been shown that the court of original jurisdiction had 'erred in law, principle, fact relied upon or in appreciation of the facts; and so erred that injustice is caused'. This jurisdiction is inappropriate in arbitration as the findings of fact in any award are the sole domain of the arbitral tribunal and cannot be reviewed by the court under the guise of questions of law.

[69] Justice Nallini was appreciative of this difference in *Exceljade* but did not allow that to restrain the court from referring to the relevant English decisions. Her Ladyship felt that because what was 'material is that the thrust of both provisions centre on 'any question of law arising out of an award', there was 'sufficient similarity between the two provisions to allow for a consideration of the United Kingdom case law pertaining to their s 1(2) of their 1979 Act when construing our s 42'. In this regard, Her Ladyship found it 'significant that the remedies afforded under both the sections is essentially similar' that the judicial pronouncements of Lord Mustill in *The Chrysalis* and later Jackson J in *Kershaw Mechanical Services Ltd v Kendrick Construction* [2006] EWHC 727 to be of relevance in determining a suitable approach to be adopted in relation to our s 42.

[70] Here, I am of the view that it cannot be overlooked that the choice of the term 'refer' as opposed to 'appeal' is deliberate in as much as the manner in which the whole substantive provision is put together is entirely peculiar to Malaysia. It calls for amongst others, the restrictive and narrow approach that I had taken in *Lembaga Kemajuan Ikan*. Unlike an appeal where there is already a decision on the question of law and the court is asked to invoke its appellate powers in reviewing that decision, a reference of a question of law arising out of an award under s 42 does not have that same character or benefit, especially since the question of law now before the court cannot be the same question that was posed before the arbitral tribunal in the first place. Although the authors of

the Arbitration Act 2005, UNICTRAL model law as applied in Malaysia, 2007 may not have attached any significance to the fact that the word 'appeal' has not been used and were of the view that s 42 actually 'provides for an appeal in all but name', the court disagrees. While there is much in common between our s 42 and sub-s 1(2) and later s 69 of the UK Arbitration Acts of 1979 and 1996 respectively, there is still much which is materially and consequentially, different.

[71] At the forefront is Parliament's deliberate choice where s 42 intervention by the court is concerned. The Legislature is clear when it comes to the question of what kind of jurisdiction is being conferred on the courts under the 2005 Act, be it appellate or original. In all its provisions, the courts are only once conferred with appellate jurisdiction, and that is to be found in s 18 in relation to the arbitral tribunal's ruling on a preliminary question on jurisdiction. In other cases, parties make the necessary applications and the courts are almost always invited to intervene to decide on matters; including those already made or yet to be made by arbitral tribunals or KLRCA. See for example ss 10, 11, 13, 15, 29, 37 and 39.

[72] Further and as pointed out earlier, the provisions of s 41 must be considered. Section 41 allows parties to refer questions of law to the court, but this time during the pendency of the arbitral proceedings or in the course of arbitration proceedings. Hence, the distinction between the two provisions of ss 41 and 42. Since such a reference may only be initiated after an award has been procured, then it makes sense that the ambit of the reference is more limiting than that found in s 41.

[73] I had earlier alluded to the fact that in *Exceljade*, Nallini J had examined the decision of *Kershaw Mechanical Services Ltd v Kendrick Construction*. In that decision, Jackson J had considered four topics under the rubric of the correct approach of the court when hearing an appeal under ss 69 and 2(a) of the 1996 Act. One of those four was this question of whether there was a philosophy of non-intervention which should influence the court hearing an appeal under s 69(2)(a). His Lordship refused to apply the views expressed by Lord Steyn in *Lesotho Highlands Development Authority v Impregilo SpA & Others* [2006] 1 AC 221, 230 on the 'ethos of the 1996 Act' and the radical nature of the changes brought by that Act. His Lordship considered those views irrelevant and five reasons were offered.

[74] Amongst the reasons were that Lord Steyn's views were expressed in the context of s 68 and not 69 which was the relevant provision under consideration. Another reason was that the 'principle of non-intervention stated in s 1(c) of the 1996 Act is qualified by the important words 'except as provided by this part'. Section 69(2)(a) of the 1996 Act is a provision falling

within that exception. It expressly permits an appeal on questions of law to be brought by agreement between the parties'.

[75] Justice Nallini adopted this reasoning in her decision in *Exceljade* and went on to say:

> In like manner under our Arbitration Act 2005, the principle of non-intervention is qualified in s 8 by the same words, namely 'except as provided for in this Act'. Under our Arbitration Act 2005, s 42 expressly allows for a question of law to be referred to the court without the need for any preliminary filter or leave application, the only qualification being that such question of law must affect substantially the rights of the parties in order to warrant interference or intervention by the High Court. To this end therefore the reasoning adopted by Justice Jackson in *Kershaw's* case may well be similarly applicable to our present case under s 42.

[76] With respect, I must disagree on this. First of all, our s 8 is worded in much stronger language than that of s 1(c) of the 1996 Act. Our s 8 as amended in 2011, reads as follow:

> *No court shall intervene* in matters governed by this Act, except where so provided in this Act. (Emphasis added.)

[77] Section 1(c) of the 1996 Act, on the other hand states:

> The provisions of this Part are founded on the following principles, and shall be construed accordingly–
>
> (a) the object of arbitration is to obtain the fair resolution of disputes ...
>
> (b) the parties should be free to agree how their disputes are resolved ...
>
> (c) in matters governed by this part *the court should not intervene* except as provided by this part. (Emphasis added.)

[78] Although Lord Steyn's views in *Lesotho Highlands* were rejected on the basis that they were made in the context of s 68 and not 69, it is worthwhile noting that His Lordship had opined along the same vein earlier in *Vitol SA v Norelf Ltd, The Santa Clara* [1996] AC 800, at p 814, that the 'primary purpose of the Act of 1979 was to reduce the extent of the court's supervisory jurisdiction over arbitration awards. It did so by substituting for the special case procedure a limited system of filtered appeals on questions of law. The change was intended to tilt the balance toward greater emphasis on the finality of arbitration awards'. While Lord Steyn may have been discussing the 1979 Act in that case, it is important to bear in mind that the observations were made in the context of how to approach appeals filed under s 1(2) of the 1979 Act; and this provision was retained in s 69 of the 1996 Act, discussed by Jackson J.

[79] Another material difference is the fact that s 69, like its predecessor in s 1(2), provides for the right of parties to consent or agree to appeal; or agree not to appeal on any question or point of law. Although there is an option of opting out of the operation of s 42 under s 3, that is still somewhat different from that found under s 69. It is because parties may agree in advance that there should be a right of appealon any question of law that one of the arguments canvassed before Mustill J was that the question of law before the court may be the same question of law posed before the arbitrator; that the parties had agreed in advance to this right of appeal so that an authoritative ruling which would allow for the court to substitute its opinion for that of the arbitrator. This argument was rejected not because of a reading of the operation of s 69 but because His Lordship could not read the agreement as showing any such intention. Mustill J said:

> Its obvious purpose was to save time and expense involved in a contested application under section 1(3)(b) of the Act.

[80] I am aware that His Lordship did go on to add at p 1475:

> Moreover, I am very doubtful whether, even if this had been the intention, it could validly have been put into effect. The court has no jurisdiction to review the arbitrator's decision otherwise than by an 'appeal' on a 'question of law', and the interpretation given to these expressions in *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724 would preclude the court from deciding on any basis other than the one which I have summarized.

[81] Because of these differences which I find subtle but material, I had earlier formed the view that the question identified for this court's determination cannot be the same as that before the arbitral tribunal whereas under the UK Arbitration Act 1996 or even the earlier 1979 Act, it the statutory provisions expressly require the same questions to be now before the court.The reasoning process as set out by Mustill J in *The Chrysalis* is furthermore analogous of an exercise by a court sitting in appellate jurisdiction. That becomes clear from p 1474 of the judgment where Mustill J said that the '... position when the appeal itself is heard is quite different. Here, there is no discretion. The only issue is whether it can be shown that the decision of the arbitrator was wrong in law. The court must answer this question yes or no, and if the answer is yes, the appeal must be allowed however finely balances the issue may be ...'.

[82] Be that as it may, I would agree with the defendant that although the UK Arbitration Act 1996 uses the term 'appeal', the reasoning process test nevertheless may prove useful but only to this extent, and that is to address the aspect of how the arbitral tribunal had reached conclusions which have given rise to a particular question of law for the court to now determine. Even Mustill J was not prepared in *The Chrysalis* to read that the court had

uninhibited jurisdiction when hearing an appeal on a question of law. Other than following the reasoning process or basis that was set out earlier in his decision, His Lordship was of the view that the 'court has no jurisdiction to review the arbitrator's decision'. So, it is not so much the question of how one set about determining that question of law, but what should the court be mindful of when determining that question.

[83] Finally, on the matter of the origins of s 42 and its interplay, if any, with other provisions such as ss 37 and 39 of Act 646. As earlier mentioned, s 42 is not part of the UNCITRAL model law and it applies automatically to domestic arbitrations unless the parties have opted out of its application; and it does not apply to international arbitrations unless the contracting parties have specifically opted in to its application. All these options will have to be in writing. Both parties submitted that s 42 must have been intended to ensure that the development of Malaysian law in domestic arbitration proceedings could be guided by the Malaysian courts; or to reflect the desirability of greater judicial intervention for domestic arbitrations as opposed to international arbitrations.

[84] Bearing in mind the various options available to the contracting party following an award, it strikes me that there must be some distinguishing elements in those options. Aside from the fact that s 42 is contained in Part III of the Act applying automatically to domestic arbitrations unless parties have opted out and applying to international arbitrations if parties had opted in at the outset, it is apparent that the basis of recourse to court is different. Section 42 is narrower and is only available where it can be shown that the award, that is, the contents of the award yields questions of law which needs the court's determination whereas ss 37 and 39 allow for challenges on grounds which are broader. There, the challenges may be on grounds of jurisdiction and powers of the arbitral tribunal andcomplaints of conflicts with public policy including challenges on the validity of the arbitration agreement and the arbitral tribunal. In that regard, even the arbitration process and the arbitration proceedings may be examined to see if the allegations made are proved. There is no such requirement under s 42 save that it must be shown how the question of law substantially affects the rights of the parties before the court.

[85] It is perhaps, unfortunate that other than providing for the matters alluded to, s 42 does not provide for the correlation between the question of law identified and what the parties are expected to establish. In the other jurisdictions, the parties are required to show how and why the arbitrator got it wrong in law. For instance, under s 69 of the UK Arbitration Act of 1996, the applicant must show that the decision is obviously wrong; that the question is one of general public importance and the decision of the tribunal is at least open to serious doubt; or that despite the agreement of the parties to resolve the

matter by arbitration, it is just and proper in all the circumstances for the court to determine the question. Section 49 of the Singapore domestic Arbitration Act is substantially similar in that respect.

[86] Although the court recognises the need and persuasive arguments made for sounding in some degree of conformity and consistency in the court's approach in these matters, the problem that the court has with reasoning process test from *The Chrysalis* is this: since the question of law cannot be one that was already before the arbitral tribunal, there is really no attributable reasoning process for this purpose. In *The Chrysalis* and in *Kershaw*'s case, the courts can be seen examining how the respective arbitral tribunals reached their conclusions on the questions now before the court. In our context of s 42, that is simply not the case. So, where does all that leave us?

[87] In my view, and to use the words of Jackson J in *Kershaw*'s case for the questions of law which have 'survived scrutiny' or threshold tests under s 42, after according some deference to the experience of the arbitral tribunal, 'the court must decide any questions of law raised by the appeal, however difficult or finely balanced they may be.' When doing so, the court will examine to see if there is any error committed by the arbitral tribunal as gleaned from the award (hence the face of the record) in that the arbitral tribunal got it so obviously wrong in law or the question of law reflects a decision that could not be reasonably reached by any other tribunal such that the award warrants intervention by the court in the manner proposed. This is concomitant with the requirement that the question of law must arise from the award and not, the arbitration or arbitration proceedings.

[88] From the above discussions, and on the assumption that proper questions of law are before the court and that these questions of law substantively affect the rights of the plaintiffs, amongst the instructive guidelines that can be drawn, in no order of importance or priority and certainly this is not intended as an exhaustive list, would be:

(a) the court's ever awareness of minimalistic intervention in arbitration matters;

(b) that the general principle that the arbitral tribunal is both the master and final arbiter of the facts applies and there is no reason why any broad approach should be adopted just because one is now pondering a question of law arising out of an award;

(c) that the court should not look beyond the award; but where necessary, the documents and correspondence referred to in the award may be examined for context and proper appreciation;

(d) that the absence of an appeal or leave mechanism advocates for a strict approach;

(e) that the absence of an appeal or leave mechanism advocates for a strict approach;

(f) the court should first determine whether questions of law have been properly identified;

(g) these questions of law must arise out of the award and not from the arbitral proceedings;

(h) these questions of law must not be academic but be questions of practical importance requiring the opinion of the court;

(i) these questions of law cannot be the same questions that were referred to the arbitral tribunal for determination;

(j) the determination of the questions of law must substantially affect the rights of the parties;

(k) grounds for referring these questions of law must be given;

(l) the interpretation of the applicable law by the arbitral tribunal is obviously wrong;

(m) public law principles are not in play in what is otherwise a private contractual dispute; and

(n) the award must be viewed in its entirety in a fair and reasonable manner.

[89] In the present case, the plaintiffs' submissions in essence is regardless which may be the proper test, whether it be the error of law on the face of the award or the reasoning process test laid down in *The Chrysalis*, the requirements have been met. The defendant contended otherwise. I shall now turn to the plaintiffs' four questions which the plaintiffs claim are questions of law within the dictates of s 42 and which the plaintiffs claim warrant intervention by this court in the terms sought.

THE FOUR QUESTIONS

[90] The parties have made extensive submissions on the questions. These submissions are set out where necessary, and adopted by the court.

[91] The plaintiffs identified four 'questions of law' which they say arise out of the award. The plaintiffs claimed that these four questions are not academic but questions which substantially affect their rights as these questions go to the root of the validity of the termination of the contract, the reason why the

parties were at adjudication, arbitration and now in court. This claim of substantiality is necessary given the mandatory dictates of sub-s 42(1A).

[92] These are the four questions:

(a) whether, upon a true interpretation of cl 15.2(c) of the contract between the parties dated 16 April 2003 ('the contract'), a 'reasonable excuse' under the said clause could include matters for which the defendant was not entitled to claim for under the contract as a result of the defendant's default in failing to comply with the necessary claims procedure under the contract;

(b) whether, upon a true interpretation of cl 15.2 of the contract, a 'reasonable excuse' under the said clause could extend to matters that the defendant was substantively not entitled to claim for as they arose out of the defendant's own default;

(c) whether there was substantive, as opposed to merely procedural, difference between the grounds that the plaintiffs relied upon to terminate the contract; and

(d) whether, upon a true construction of cl 8.3 of the contract, the engineer pursuant to the said clause was not entitled to require that the defendant put forth a revised programme that was compliant with the contractually agreed completion date in the situation where compliance with such completion date had become impossible as a result of the defendant's default.

THE RELIEFS SOUGHT

[93] Consequent to the determination of those four questions, the plaintiffs have sought the following reliefs:

(a) a declaration that the tribunal had erred in law and on a true interpretation of cl 15.2(c) of the contract, a 'reasonable excuse' under the said clause cannot include matters for which the defendant was not entitled to claim for under the contract as a result of the defendant's default in failing to comply with the necessary claims procedure under the contract;

(b) a declaration that the tribunal had erred in law and on a true interpretation of cl 15.2(c) of the contract, a 'reasonable excuse' under the said clause cannot extend to matters that the defendant was substantively not entitled to claim for as a result of the defendant's default;

(c) a declaration that the tribunal had erred in law and there was a substantive difference between the grounds relied on by the plaintiffs to terminate the contract;

(d) a declaration that the tribunal had erred in law and on true interpretation of cl 8.3 of the contract, the engineer, pursuant to the said clause, is entitled to require that the defendant put forth a revised programme that was compliant with the contractually agreed completion date regardless of whether it was possible to comply with such a completion date;

(e) the award be set aside in whole or to the extent as may be determined by this honourable court; and

(f) the disputes in the award or the parts of the award so set aside be tried afresh by a newly appointed arbitral tribunal.

THE RELEVANT CLAUSES

[94] The questions relate to the plaintiffs' two grounds for terminating the contract. In order to follow and better appreciate the arguments, it is best to set out the relevant parts of cll 8 and 15 of the contract, the material clauses under consideration:

Termination by employer

15.1 Notice to correct

If the contractor fails to carry out any obligation under the contract, the engineer may by notice require the contractor to make good the failure and to remedy it within a specified reasonable time.

15.2 Termination by employer

The employer shall be entitled to terminate the contract if the contractor:

(a) fails to comply with Sub-Clause 4.2 (Performance Security) or with a notice under Sub-Clause 15.1 (Notice to Correct),

(b) abandons the Works or otherwise plainly demonstrates the intention not to continue performance of his obligations under the Contract,

(c) without reasonable excuse fails:

(i) to proceed with the Works in accordance with Clause 8 (Commencement, Delays and Suspension), or

(ii) to comply with a notice issued under Sub-clause 7.5 (Rejection) or Sub-Clause 7.6 (Remedial Work), within 28 days after receiving it.

[95] In this case, cl 15.2 needs to be read with cl 8 which deals with matters concerning commencement, delays and suspension, especially sub-cll 8.1 and 8.3:

> 8.1 Commencement of Works
>
> The Engineer shall give the Contractor not less than 7 days' notice of the Commencement Date. Unless otherwise stated in the Particular Conditions, the Commencement Date shall be within 42 days after the Contractor receives the Letter of Acceptance.
>
> The Contractor shall commence the execution of the Works as soon as is reasonably practicable after the Commencement Date, and shall then proceed with the Works with due expedition and without delay.
>
> 8.2 ...
>
> 8.3 Programme
>
> The Contractor shall submit a detailed time programme to the Engineer within 28 days after receiving the notice under Sub-Clause 8.1 [Commencement of Works]. The Contractor shall also submit a revised programme whenever the previous programme is inconsistent with actual progress or with the Contractor's obligations. Each programme shall include:
>
> (a) the order in which the Contractor intends to carry out the Works, including the anticipated timing of each stage of design (if any), Contractor's Documents, procurement, manufacture of Plant, delivery to Site, construction, erection and testing,
>
> (b) each of these stages for work by each nominated Subcontractor (as defined in Clause 5 (Nominated Subcontractors)),
>
> (c) the sequence and timing of inspectionsand tests specified in the Contract, and
>
> (d) a supporting report which includes:
>
> (i) a general description of the methods which the Contractor intends to adopt, and of the major stages, in the execution of the Works, and
>
> (ii) details showing the Contractor's reasonable estimate of the number of each class of Contractor's Personnel and of each type of Contractor's Equipment, required on the Site for each major stage.
>
> Unless the engineer, within 21 days after receiving a programme,gives notice to the contractor stating the extent to which it does not comply with the contract, the contractor shall proceed in accordance with the programme, subject to his obligations under the contract. The employer's personnel shall be entitled to rely upon the programme when planning their activities.
>
> The contractor shall promptly give notice to the engineer of specific probable future events or circumstances which may adversely affect the work, increase the contract price or delay the execution of the works. The engineer may

require the contractor to submit an estimate of the anticipated effect of the future event or circumstances, and/or a proposal to the engineer under sub-cl 13.3 ('variation procedure').

If, at any time, the engineer gives notice to the contractor that a programme fails (to the extent stated) to comply with the contract or to be consistent with actual progress and the contractor's stated intentions, the contractor shall submit a revised programme to the engineer in accordance with this sub-clause.

[96] Then, there is cl 20.1:

> 20.1 Contractor's Claims
>
> If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.
>
> If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim ...

QUESTIONS 1 AND 2

[97] Given that the first two questions revolve around the same clauses and parts of the award for which similar arguments are raised, it makes sense to deal with these two questions together. The central issue in these two questions concerns the arbitral tribunal's interpretation of the concept of 'reasonable excuse' within cl 15.2(c) of the contract. These are the plaintiffs' argumentson a very specific sub-issue of law with respect to the plaintiffs' termination of the contract which I summarise from their comprehensive written submissions which learned counsel had supplemented with full oral submissions.

[98] According to the plaintiffs, cl 8.1 of the contract imposed a 'two-fold obligation on the defendant to proceed with due expedition and without delay'. The defendant would be in breach if it failed in either of these two obligations. Such breach would resound in the right to the plaintiffs to impose liquidated damages, or to terminate under cl 15.2(c). However, the right to terminate under cl 15.2(c) is only available where 'two elements' are met: that the defendant is in fact in breach; and the defendant has no reasonable excuse for that breach. The burden was of course, on the plaintiffs to prove these requisites.

[99] The plaintiffs contended that the arbitral tribunal had agreed with the

plaintiffs that 'in determining issues based on an obligation to proceed with due expedition and without delay, it is not permissible to focus on the late period and ignore the earlier delays' — see paras 736–737. The various delays in the project were then analyzed by the arbitral tribunal.

[100] In its analysis of the delays as reflected at paras 738–741, 747, 749, 774–776 and 919–920 of the award, the arbitral tribunal is said to have 'found that substantial delay of the project was attributable to the defendant and the tribunal decided that the defendant was in breach of cl 8.1 of the contract as it was in delay with respect to the works'. 'Notwithstanding this finding', the plaintiffs contended that the arbitral tribunal 'went on to find that the plaintiffs could not terminate the contract pursuant to cl 15.2(c) of the contract'. It was the plaintiffs' contention that the 'only manner in which the arbitral tribunal could arrive at such a conclusion was through an application of the second element of 'reasonable excuse'. Further parts of the award were identified in support, namely paras 239–240, 731, 749, and 778–782.

[101] The plaintiffs contended that the arbitral tribunal's decision that the phrase 'reasonable excuse' was 'wide enough to include events' or 'circumstances which would have enabled the defendant to claim time even if it was no longer entitled to do so because it had failed to give the requisite notice' is erroneous and is based on principles that are wrong in law and/or contradict well-established legal principles. Such interpretation has the effect of allowing the defendant to rely or take advantage of its own wrong, that wrong or default was in not complying with the notice provision. The Supreme Court's decision in *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302; [1987] CLJ (Rep) 102; and the Court of Appeal's decision in *Dato' Abd Rahim bin Mohamad v Abdul Farish bin Rashid* [2008] MLJU 652; [2009] 1 CLJ 395 were cited in support.

[102] It was further argued that such interpretation is based on principles of construction which the law does not countenance; rendering the award 'squarely within the ambit of error of law on the face of the award' and meriting intervention by the court. It is the interpretation of this very specific sub-issue of law with respect to the plaintiffs' termination of the contract that the plaintiffs want the court to determine as a question of law within s 42.

[103] It is the plaintiffs' case that on a true interpretation of cl 15.2(c) of the contract, a 'reasonable excuse' under cl 15.2(c) cannot include matters for which the defendant was not entitled to claim or was barred from claiming under the contract. Where the defendant is itself in default by failing to comply with the necessary claims procedure under the contract, the defendant cannot rely on those matters which it was not entitled to claim, as a defence to a termination of the contract.

[104] The plaintiffs went on to submit that the arbitral tribunal's interpretation here was actually 'a more egregious breach of the trite principle of construction' because aside from going against the incontrovertible principle that a defaulter cannot take advantage of his own wrong, the interpretation also meant that the contract was not being construed harmoniously with other provisions of the contract; and it contradicted express language of cl 20.1 of the contract. These trite principles of construction being found in the Supreme Court's decision in *Chooi Siew Cheong v Lucky Height Development Sdn Bhd & Anor* [1995] 1 MLJ 513; [1995] 2 CLJ 11; and the Court of Appeal's decision in *Pembinaan Perwira Harta Sdn Bhd v Letrikon Jaya Bina Sdn Bhd* [2012] 4 MLJ 774. Clause 20.1 required the defendant to give notice to the engineer of a claim for extension of time within a period of 28 days and that failure to give such notice would, inter alia, discharge the plaintiffs from all liability in connection with the claim.

[105] The plaintiffs contended that the arbitral tribunal's interpretation of 'reasonable excuse' meant 'practically any matter could potentially constitute a 'reasonable excuse' to the defendant's failure to proceed with due expedition. This was the case even where, substantively, the defendant was unable to claim an extension of time and/or where the delay was caused by the defendant (wholly or partly)'. For these reasons, the questions warrant intervention by the court.

QUESTIONS 3 AND 4

[106] These two questions concern the plaintiffs' other ground for terminating the contract. Here, the plaintiffs conceded that both questions must be answered in their favour before the award may be set aside on these complaints. The relevant portions of the award are paras 724, 732 and 773 for the third question while paras 758–770 are relevant to the fourth question.

[107] The third question relates to the arbitral tribunal's conclusion that there was no substantive difference between the two grounds relied on by the plaintiffs for terminating the contract; while the fourth question relates to the arbitral tribunal's finding that the engineer was not entitled to call for a revised programme because the defendant was not in breach of its obligations under cl 8.3.

[108] At para 724 of the award, the arbitral tribunal is said to have been 'unable to identify any difference', 'substantive, as opposed to procedural between the two routes', that both routes 'were concerned with progress'. According to the plaintiffs, there is indeed a substantive difference between the two grounds by a reading of the express wording of the two clauses. A termination under cl 15.2(c) is where the defendant has without reasonable

excuse failed to proceed with the works with due expedition and without delay; while a termination under cl 15.2(a) is where the defendant has failed to provide a revised programme that was in compliance with the contract. The latter did not call for a consideration of 'reasonable excuse'. All that the plaintiffs would be required to justify termination under cl 15.2(a) was a breach of cl 8.3 when the defendant failed to provide a revised programme that was in compliance with the contract; that it failed to rectify that breach when notified to correct by the engineer pursuant to cl 15.1; and that the requirements of cl 15.2(a) had been met. Yet, paras 732 and 773 show the arbitral tribunal concerning itself with the same substantive considerations for both grounds.

[109] The plaintiffs submitted that the arbitral tribunal's decision here is a clear instance of a failure to analyze and appraise itself of the effect of a contractual provision in its entirety as contemplated by the Federal Court in *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] 1 MLJ 401; [2004] 1 CLJ 743. The arbitral tribunal is further said to have interpreted the contractual provisions contrary to clear and express wording of the termination clauses within the contract. It is the plaintiffs' contention that such conclusions and findings were clearly against the clear terms of cll 15.2(a) and 15.2(c) of the contract and 'wholly illogical'.

[110] The fourth question relates to the interpretation of sub-cl 8.3. The arbitral tribunal had found that the engineer was not entitled to require the defendant to provide a revised programme pursuant to cl 8.3 where compliance with the contractually agreed times for completion had become an impossibility. The plaintiffs submitted that the arbitral tribunal is said to have stated at para 762 that 'this was the case even where the defendant had 'through its own difficulty' fallen so far behind the programme'. This harks back to the two earlier questions; that the effect of this decision is to allow a party such as the defendant, who is in the wrong or in default, to take advantage of its own wrong or default. Such an outcomeagain, runs contrary to the well-established principle which prohibits such reliance and claim. The plaintiffs relied on the Federal Court's decision in *Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor* [2009] 6 MLJ 293; [2009] 6 CLJ 430 which had in turn, cited with approval the Court of Appeal's decision in *Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd* [2007] 4 MLJ 201; [2007] 3 CLJ 695. In dealing with the ambit of s 57 of the Contracts Act 1950, the Court of Appeal had decided, inter alia, that the situations of frustration would not apply to situations of self-induced frustration.

[111] The plaintiffs gathered from the defendant's affidavits that there were two other findings by the arbitral tribunal that the defendant claimed supported the arbitral tribunal's conclusion that the engineer could not demand such a programme. First, the findings that the engineer had wrongly

rejected the defendant's notices of claim for additional time; and second, that the engineer had failed to properly determine ground treatment measures.

[112] It is the plaintiffs' argument that these other findings relate to the engineer's failings with respect to the obligations of his role and have no link with the engineer's rights and powers under cl 8.3. From its reading of cl 8.3, the plaintiffs say that 'the engineer did not have to be in full compliance with his own obligations before he is entitled to call on the defendant to provide a revised programme under the clause'. In any case, a review of the award is said to show that the arbitral tribunal did not conclude that the engineer could not demand a programme showing a contractually complaint completion date as a result of any alleged failings on the part of the engineer' himself. Therefore, the plaintiffs submitted that the only reason for the arbitral tribunal's decision must have been as reflected in the posed fourth question.

[113] The plaintiffs further submitted that with the arbitral tribunal's interpretation of cl 8.3, 'the defendant could then rely on its own defaults and delays to avoid liability under cl 8.3 so long as the delays were sufficiently egregious such that meeting the contractual completion date was impossible; that the engineer could only call on the defendant to provide a contractually compliant revised programme where the defendant was in situation of a relatively minor delay but not where it was in such grievous delay that meeting the contractually agreed completion date had become impossible. This leads to the illogical consequence that the more grievous a delay the defendant had created, the less likely it would fact liability under cl 8.3 of the contract'.

THE RESPONSES

[114] These were the defendant's main responses which are summarised from their full written and oral submissions. The defendant's arguments are not intended for just the first two questions but for all four.

[115] Firstly, the defendant argued that the four questions do not arise out of the award and are therefore not true or real proper questions of law. This is because the questions posed are based on wrong assumptions. The defendant explained that the questions assume that the defendant was in the first place, in breach of its obligation to proceed with due expedition and without delay and thereby needed a 'reasonable excuse' to excuse itself from this breach in order to avoid a termination of the contract under cl 15.2(c). When the award is properly examined, it will be seen that the arbitral tribunal found that the defendant had in fact fulfilled its obligation in this regard. Hence, 'reasonable excuse' under cl 15.2(c) was actually not a relevant consideration in the arbitral tribunal's reasoning process.

[116] Further, the arbitral tribunal was of the view that only a serious culpable delay could justify a termination of the contract. With that, and using the autumn or September 2005 as the pivotal point, the arbitral tribunal went on to find that there were both delays prior to and after that date. While there was delay prior to September 2005 for which the defendant was involved, the arbitral tribunal found that delay was not remarkable and would not have justified a termination of the contract as compared to the delay from September 2005 onwards, for which the plaintiffs were responsible. With the plaintiffs not challenging these key parts which are in fact findings of the award, the questions effectively threw up inconsistencies in the plaintiffs' own arguments.

[117] Along the same vein, the questions also assumed that the defendant did not submit compliant notices to the engineer claiming for extension of time. It was the defendant's case that the arbitral tribunal found that the defendant did so submit but it was the engineer who had failed to properly deal with these notices — see paras 722 and 769 of the award.

[118] Secondly, the defendant argued that the questions posed were not real and proper questions of law because these questions are academic and do not affect the plaintiffs' substantive rights for two reasons.

[119] First, the arbitral tribunal had made a factual finding that the plaintiffs did not have any contemporaneous intention to terminate the contract on account of the pre-September 2005 delays even if the plaintiffs had such a right to start with. Even if the plaintiffs had a right to terminate on the basis of the defendant's delay in late 2004 and early 2005, the arbitral tribunal found that the plaintiffs themselves did not attempt to use those delays to terminate the contract at the material time. Instead, the plaintiffs elected to ask the defendant for an updated programme to monitor the progress of the works while setting monthly targets to make up for some of the lost time. Having made that election, the plaintiffs were precluded from later resorting to those reasons to terminate the contract; see *Kosmar Villa Holidays plc v Trustees of Syndicate 1243* [2008] EWCA Civ 147 and *Kammins Ballroom Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850.

[120] Next, the arbitral tribunal's legal reasoning is said to be inter-linked. The defendant argued that even if for a moment it was concluded that the arbitral tribunal's interpretation of cl 8.3 of the contract was wrong, there were still other findings of the arbitral tribunal that cannot be ignored. Principal amongst those findings was the plaintiffs' responsibility for the serious delay of the project; and that the engineer had no right to demand a programme showing the completion date for the works when he himself had failed to assess the defendant's entitlement to an extension of time. The defendant pointed out

that these were the arbitral tribunal's conclusive findings of fact that ultimately became the basis and foundation for its decision and award. These facts were properly analysed against the correct backdrop of contractual provisions and legal propositions before a correct conclusion was reached. That conclusion being that the plaintiffs had repudiated the contract. Given that the plaintiffs are not challenging every aspect of the arbitral tribunal's legal reasoning, the defendant argued that the questions of law posed and the answers suggested must necessarily be consistent with the other parts of the reasoning which are not challenged. Otherwise, an untenable contradiction would ensure.

[121] It was the defendant's submission that there was simply nothing wrong with the arbitral tribunal's legal reasoning or analysis, or even the legal and contractual principles that it had relied on for its decision. With no misdirection, s 42 was not engaged as the decision of the arbitral tribunal was one which any reasonable tribunal could have reached. There were therefore no arbitral errors that justify any judicial intervention under s 42.

[122] Specifically and in relation to the third question, the defendant submitted that the plaintiffs had relied on para 724 of the award to, in the defendant's words, 'manufacture a justification for raising this question'. The defendant explained that the arbitral tribunal was merely pointing out that both of the plaintiffs' grounds for termination were concerned with progress and that serious delay on the defendant's part had to be established before termination on either ground could be justified.

[123] In relation to the fourth question, the defendant submitted that it was based on a false premise in which case it cannot be said to arise out of the award. The plaintiffs are said to have relied on the false assumption that the impossibility of producing a programme showing the original completion date for the works was due to the defendant's default. The defendant argued that a perusal of the award showed that the reality was it was the plaintiffs who were primarily responsible for the impossibility of completing the works on time. Various parts of the award were pointed out in support including the arbitral tribunal's recognition that prior to September 2005, there was at least a theoretical possibility of recovering some of the time lost in the early stages of the project given that the arbitral tribunal had found that the defendant had exceeded the engineer's August 2005 target by 21 rings. However, this 'ability to make up lost time was lost when the project went 'pear-shaped' in September 2005 as a result of the plaintiffs' defaults' — see paras 753, 755 and 801–802 of the award.

[124] Another argument raised by the defendant as to why the fourth question does not arise out of the award is this. The arbitral tribunal found that the termination notice would be prima facie bad if the plaintiffs failed to

acknowledge the defendant's entitlement to an extension of time. The arbitral tribunal found that the engineer had failed to properly deal with the defendant's notices claiming for additional time to complete the works as a result of the TBM's encounter with unforeseeable adverse ground conditions. The arbitral tribunal also found that the defendant was entitled to an extension of time of 96 days — see paras 722 and 769, 732–735, and 1100(b) of the award. All these findings are not challenged by the plaintiffs. That meant that the plaintiffs were wrong in assuming that the engineer was entitled to demand that the defendant produce a programme showing the original completion date for the works.

TESTS FULFILLED?

[125] Upon consideration of the full written and oral submissions articulated by both parties, and after very careful examination of the award, with respect, the court is unable to conclude that the award merits intervention of the court for the reasons submitted by the plaintiffs. The court in fact, agrees almost entirely with the submissions of the defendant. The questions posed do not meet the requirements of s 42, be it under the existing test of the award containing an error of law on its face as reflected by the questions posed; or that the reasoning process of the arbitral tribunal reveals errors of law which merit intervention of the court.

[126] Following this court's earlier observations on the requirements of s 42, any question of law posed must be determined by reference to the whole award. In as much as the plaintiffs have complained about certain parts of the award, there is much of the award that they have not complained of; in which case, reasonably, the plaintiffs must be taken to be plainly, fully and completely satisfied with those findings and reasoning. In fact, the plaintiffs have pointed out that there are no challenges on the factual findings; and implicitly much of the arbitral tribunal's legal reasoning. In my view, any award which is challenged must be read and scrutinised in a fair and reasonable manner, and in its entirety,in order to appreciate and understand its full meaning and implication, especially in relation to the terms of the reference to arbitration in the first place. An award, including the present award, must never be read in segments, installments or without context. To do so would be a discredit to the award and to the arbitral tribunal that had so carefully and ably reasoned that award, and perhaps even disrespectful of the parties' choice of dispute resolution.

[127] It is therefore not open to the plaintiffs to read isolated parts of the award, ignoring the rest which is what I find the plaintiffs to have done here. In a challenge under s 42, the plaintiffs' arguments would be evaluated against the unchallenged parts of the award to see if there is any inconsistency in the

approach and positions taken. More significantly, such evaluation goes a long way in establishing whether the plaintiffs' substantial interests have at all been affected.

[128] Having done that, I agree with the defendant that the plaintiffs' arguments on the questions leave the plaintiffs in a much conflicted and inconsistent position. The court is also not convinced that the plaintiffs' rights are in any way affected, let alone, substantially. An examination of this well-reasoned award will readily confirm this.

THE AWARD

[129] The award is set out in 432 pages. To assist the arbitral tribunal, the parties had identified a list of issues for its determination. Those issues totaled 25 in number can be found at pp 414–422 of the award. Broadly, this was the award.

[130] After dealing with some preliminary issues, the arbitral tribunal acquainted itself with an overview through a 'brief history of the project' (paras 38–63). This history is set out as it is equally important for the purpose of appreciating the arguments raised in this application and to understand how and why the arbitral tribunal reached the decision(s) that it did.

[131] The history is this. In August 2001, the plaintiffs obtained a desk study report on the geology and history of the proposed site of SMART. Based on general information relevant to the dimensions of the SMART, the defendant provided the plaintiffs a budget price. This was to assist the plaintiffs in their negotiations with the Government of Malaysia who at the time were trying to convince the government on giving them the concession. Following pre-qualification of tendering contractors, the defendant was shortlisted and then invited to bid for three elements of the project. The defendant made a bid for the construction of the north tunnel section drive including the supply of the relevant tunneling equipment and ancillary plant; the supply of segment steel moulds; and the construction of intermediate road decks. It was awarded the north section in the sum of RM331,619,633. Following this, the defendant placed an order for the relevant tunneling equipment. The contract for the north section was executed on 16 April 2003. Work including preparatory work then proceeded.

[132] According to the arbitral tribunal '2005 brought the first clear indication of problems'. The arbitral tribunal then set out the critical events.

[133] First, 'the beginning of February, Wayss formally indicated a delay of three months. In the middle of the month, the engineer confirmed agreement

to a change in the system for surveying the tunnel ahead of the boring. The sonic sonar probing was to be replaced with a system involving 2D resistivity measurements'. Next, on 2 March 2005, the TBM was relaunched for the second part of the north tunnel, section B in the words of the arbitral tribunal:

> 48. Progress from this point on became contentious. The revised programme lodged by Wayss with the Engineer at the beginning of the month showed a completion date of 14 August 2006. The Engineer did not accept this programme although he said that he would use it for monitoring progress. By the beginning of April, there were warnings threatening termination from the Engineer.
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> 49. On 12 March 2005, Ring No 434, the first of the permanent rings in Section B, was duly completed. By the end of July the JV was complaining that Wayss had completed 992 rings against the 1000 that had been the aim. At the same time it was agreed that the use of metal probes should cease as being too dangerous.

[134] The arbitral tribunal noted several events in the months of June–August of 2005. First, two companies, Majumec Bina Sdn Bhd and Maxi Mekar Sdn Bhd were commissioned by the plaintiffs 'to carry out further borehole investigations between CH 3650 and CH 1800 and between CH 1744 and CH 364. The object of this was to facilitate a possible supplemental agreement' between the parties under which the defendant would take over the investigation and treatment of the subsoil. Next, it noted that there were discussions between the parties over an additional payment to the defendant for additional work.

[135] Then came 'late summer and autumn'. In August, the defendant 'forwarded the engineer a soil investigation report based on boreholes drilled between CH 3410 to CH 2954 for the purpose of determining appropriate places for cutterhead interventions; almost immediately on top of this event came sinkhole problems at CH 3350. This was followed six days later by the first major sinkhole at CH 3280'.

[136] At para 52, the arbitral tribunal noted that:

> Two days later, two plans of the areas were provided to Wayss. It transpired in due course that these plans had been part of the 2001 GIR. Wayss announced its intention to drill ten boreholes at ten metre intervals in front of the then position of the TBM. However, a further two days on, on 19 September 295, Wayss was requesting boreholes at 7.5 metre intervals along the centre line of the Tunnel. The purpose of this exercise was to determine in advance the character of the ground to be encountered.

[137] The arbitral tribunal noted that the engineer agreed to instruct boreholes at ten metre intervals. At the same time, the defendant raised the issue of loose soils being thrown up by its investigations between CH 3220 and 3190 which the defendant contended was similar to those found at CH 3280,

where the first major sinkhole occurred. The SPT or standard penetration tests indicated 'a very low density and therefore a material highly likely to collapse'.

[138] What followed was the defendant formally serving two notices in respect of additional work (claim No 9). Although there was agreement between the engineer and the defendant as to the necessary grouting measures that had to be taken immediately, the engineer took the view on 30 September 2005 that these measures 'were only necessary because of the improper operation of the TBM by Wayss. Accordingly, the cost of the measures was to be to Wayss' account'. The defendant and the engineer disagreed on this with the upshot being that the engineer was 'only prepared to issue instructions for grouting which would carry payment in respect of rockhead below the invert where the soil was very weak'.

[139] Meanwhile, another sinkhole occurred; this time on 22 November 2005 at CH 2948. It brought 'tunneling to a complete halt, and it became necessary to carry out very extensive work to recover the TBM. The sinkhole also caused the partial collapse of a building — the UMNO building. This had to be completely demolished'. Following this, the defendant presented the plaintiffs 'an outline of the extensive temporary works that were necessary to enable the tunneling works to recommence'. With this, the defendants notified the plaintiffs of its claim No 13.

[140] At the beginning of December 2005, the defendant submitted a method statement and revised programme for the recovery works to the engineer and the supervising consultant; and 'immediately began the work'.

[141] On 8 December 2005, the parties met. At that meeting, the plaintiffs handed over to the defendant a request ('joint venture's ultimatum') for completion of the remaining works by 31 December 2006. In it, the plaintiffs agreed to 'waive alleged claims if such completion is achieved. Further, Joint Venture offers RM11m for grouting works if Wayss and Freytag will waive claims with regard to unforeseeable ground conditions. Further, joint venture states that it no such written agreement is achieved by 15 December 2005, joint venture will terminate contract'. The defendant did not accept the proposal.

[142] A 'completion date dispute' then arose. By the end of December the parties were said to be 'in full dispute mode'; culminating in reciprocal notices of intention to determine the contract being issued on 6 January 2006 with the defendant's notice being first in time.

[143] Payment of the monies certified in Payment Certificate No 25 was late while the defendant's claim No 13 was rejected by the engineer. On 23 January 2006, both parties took action to bring the contract to an end, with the

plaintiffs being first in time. The bank guarantee was called and the plaintiffs took over the work of completing the north section, resuming drive on 18 April 2006. The tunneling was then completed in April 2007.

[144] Against this backdrop, the arbitral tribunal proceeded to address the issues in the dispute. While it realised quite early that the 'key issue in this case' was that concerning the validity or otherwise of the plaintiffs' termination, it recognised too, that there were other 'important subsidiary issues' which 'turn on the Wayss contention that the soils encountered in the autumn of 2005 were unforeseeable and on the JV contention that the operation of the TBM was — in substance — incompetent'. This was later reiterated at para 281 as follow:

> 281. As indicated above the heart of the dispute that developed in the autumn of 2005 essentially involved Wayss complaining about the characteristics of the ground through which it was tunneling while the JV asserted that the problems were caused by poor workmanship. It was a concomitant of the Wayss position that ground treatment was needed and it became the position of the engineer that, effectively, he was not going to approve payment for a substantial part of the exploratory and stabilization work for which Wayss contended at the time.

[145] Although the arbitral tribunal was initially 'skeptical about both contentions', it was 'persuaded that the actual conditions encountered were in fact unforeseeable'; and the arbitral tribunal went on to conclude 'that the complaints made about Wayss' operation of the TBN were misconceived, although it does have some reservations about the circumstances at the time of the ground deformations on the 22–23 November 2005. On the main issue, the tribunal has concluded that the termination was invalid. To the detail of that conclusion the tribunal will turn in due course. There is a good deal of material relevant to specific aspects of the case to be addressed before the tribunal can turn to the contract and the allocation of responsibility'.

[146] In relation to the termination notices issued by the plaintiffs, this is what the arbitral tribunal concluded on the contents of the notices:

> 432. In substance there are two grounds – failure to proceed with the Works with due expedition and without delay; and failure to submit a revised programme in accordance with Sub-Clause 8.3.
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> 433. The ground of failure to proceed with due expedition and without delay is the more substantive and comprehensive of the two grounds. The issue of the programme which, although threatened at the beginning of the year, really only came to a head in the late autumn of 2005, is the narrower of the two grounds.

[147] At para 434, the arbitral tribunal expressed the view that:

> Both grounds require some analysis of the time taken by Wayss to carry out the Works and that necessarily also involves some analysis of subsoil conditions which was very much a key element of dispute in the hearings. That said, it is the view of

> the Tribunal, essential that the analysis of time is preceded by the analysis of the geology of the drive as it was encountered during the period that gave birth to the present dispute – namely the autumn of 2005. It is principally upon what happened then that Wayss founded its argument as to the unforeseeability of the ground conditions. Thereafter the Tribunal will turn to timing and finally return to the grounds of termination.

[148] From paras 67–722, one will find the arbitral tribunal addressing these specific elements in the dispute; ranging from matters concerning the tunneling technology and tunneling equipment; the geotechnical information available; the progress of the works to the contractual arrangements between the parties touching on the relationships between the engineer and the supervising consultant with the defendant; the areas of engineering control and the responsibility for various actions when ground stability problems presented in the course of the works. Matters concerning time for completion and extensions of time were also addressed in substantial detail.

[149] I pause here to observe that this familiarization of the dispute and ascertainment of the facts is absolutely vital in any determination. It provides the necessary matrix or context against which the principal issue of termination which plague the parties will be determined. This is proper and in accord with good administration of justice; including arbitration. There is therefore nothing here that calls for any scrutiny.

[150] Pressing on and as mentioned, the award reflects the considerable time and effort expended by the arbitral tribunal in addressing 'a good deal of material relevant to the specific aspects of the case'. The court feels it material to appreciate those specific aspects as in so doing, it will be readily seen that there was more than meets the eye; that the plaintiff's complaints are unfounded aside from a case of fragmented reading of the award without taking into account the rest of the award; and what and how the arbitral tribunal really took into account in coming to its conclusion and finally making its award.

[151] Amongst the materials and specific aspects examined were those concerning the tunnel boring machine ('the TBM') mentioned in the earlier brief history. The arbitral tribunal recognised that the TBM in the present case 'ran into two major problems. First it 'dived'. This is similar to a large lorry going into a ditch. Retrieving the lorry would not be easy. Retrieving over a thousand tons of machinery is a huge job. Second here were major problems in the autumn of 2005 culminating with the UMNO Building'.

[152] Hence, in the face of these 'two major problems' and the competing contentions of the parties, it was indeed appropriate if not logical for the

arbitral tribunal to concern itself with the technology of tunneling machines including how such machines operated or are controlled; the selection criteria for the appropriate type of TBM; and, the technical specification for the particular TBM in the present case — slurry tunneling machines [STM] and earth pressure balance machines [EPMS] were chosen with STM maintained by both parties as 'the most appropriate choice'; and the circumstances related to those choices (essentially due to soil characteristics and ground conditions).The arbitral tribunal viewed the 'selection of the correct type of tunnel boring machine is of vital importance to the successful implementation of a project such as the SMART Tunnel'.

[153] The TBM was described as an 'underground factory ... a mobile factory ... weighs between one and two thousand tons. Safe operation — safe for the operatives, safe for those such as residents above the tunnel line, safe for the machine — is critically important. Equally the machine must be effective. It must actually be able to mine the tunnel'. The machine chosen must therefore be able to tunnel through prevailing ground conditions or nature of the soils.

[154] The arbitral tribunal then reviewed the information on the nature of the soils that would be encountered in the works that was made available to tenderers including the defendant. It found that amongst such information was the 'tunnel boring machine technical specification' which contained geotechnical information on the ground or soil conditions. This document was prepared by the plaintiffs as part of the tender exercise for the supply of the TBM for the north tunnel construction works. The other documents were the plaintiffs' briefing document; six volumes (1364 pages) of pre-tender borehole soil data; and two reports known as 2001 GIR ('the north tunnel') and 2002 GIR ('the south tunnel'). The geotechnical information available from pre-tender to the additional investigations done by the parties, as well as soil data and analyses by experts, and potential causes of ground instability were all extensively reviewed and considered by the arbitral tribunal. I must say that this review is highly appropriate given the problems encountered during the progress of the contract.

[155] In its own words, the arbitral tribunal stated at para 435:

> In this lengthy section the Tribunal has considered the geology of the site in detail and has sought to put its analysis into the context of the contractual obligations of the Parties.

[156] From paras 436–714, the arbitral tribunal very carefully evaluated the data, reports and activities of the respective parties before concluding at paras 715–722 as follow:

715. The presence of adverse physical conditions, namely ex-tin mine tailings containing a variety of detritus overlying the limestone became a major complication in the construction of the tunnel from CH 3450 onwards ...

716. The effect of these conditions was that a ground treatment programme was essential to stabilize the soft soils: before this could be planned properly an extensive site investigation programme was necessary systematically to identify the areas that would require ground treatment. For the tunneling not to be delayed, these activities would have to be carried out well in advance of the face of the TBM.

717. The Supervising Consultant was aware that the tunnel face would enter ex-tin mining tailings at the position which it first encountered them but took no action to anticipate the problems. The site investigation which actually took place was largely undertaken as an emergency measure in response to the sinkholes which occurred. This leads to the issue of whether these methods could have been planned earlier.

718. It is clear, as the DAB concluded, from the evidence that the necessary programme of additional site investigation and ground improvement would have been a major exercise. It is also evident that the pre-tender site investigation in this region of complex geology was inadequate to identify the problems in the necessary detail.

719. The pre-tender site investigation might be considered adequate in an area where conditions reasonably undisturbed but in complex and disturbed conditions existing for this project it is considered that it was not. The Tribunal has concluded that the Joint Venture compensated for this by accepting the risk of unforeseen physical conditions being encountered. By contracting for ground stabilization to be a matter essentially for the Engineer and not the Contractor and by giving Mott a very extensive role in this area. That said it seems clear to this Tribunal that the extent and seriousness of the problem was not anticipated by the JV even with the benefit of GIR 2002.

720. The Engineer was of the opinion that the TBM was capable of boring through the present ground conditions if the machine was operated correctly as required in the Contract, together with the geotechnical investigation and treatment proposed by Wayss as allowed for in the Contract and as instructed by the Engineer which was to be paid at the rates in the Bill of Quantities. The geotechnical treatment was to be carried out following forward probing in order to locate features which might need to be stabilized. The Engineer further stated his observations that the previous sinkholes occurred due to the wrong operation of the TBM, noting that the slurry pressures were below design, the slurry parameters were outside the specified and approved values and the machine's crusher and Samson units were not working correctly.

721. In making these statements, the Engineer appears to have divorced himself from reality:

(a) He appears to have restricted the geotechnical treatment to that arising out of forward probing which was agreed to be quite ineffective;

(b) He disregarded the evidence being presented to him that suggested that the ground being encountered was unforeseeable under the provisions of the Contract;

(c) He refused to order ground treatment necessary to permit the safe passage of the TBM in the disturbed ground encountered from CH 3500;

(d) He alleged defective operation of the TBM when it is clear from the evidence and from the JV's experience in completing the Tunnel that it was the ground that was its problem;

(e) He appears never to have acknowledged that the views he had at the time could be wrong.

(f) The narrative set out in this award between paragraphs 282 and 400 provide many instances of Wayss getting it right. It is particularly worth noting that Wayss said in terms that it was unable to calculate a face stability pressure and asked for the Engineer to set out the basis of his opinion that the TBM could safely tunnel through the encountered materials without the assistance of ground stabilization. That basis was never supplied and instead the question was turned back on Wayss when the events of November occurred. Yet it is clear that under the Contract this information was specifically for the Engineer to determine.

722. In the premises, the Tribunal has concluded that the conditions encountered by Wayss on and after 15 September 2005 were unforeseeable within the meaning of Sub-Clause 1.1.6.8 of the General Conditions of Contract. Due notice was given in accordance with Clause 20. The notice given on the 23 September 2005 for example was what might be called a pitch perfect notice. The Engineer, quite wrongly, summarily rejected that and other notices. Wayss is, pursuant to Sub-Clause 4.12, entitled to an appropriate extension of time insofar as these events caused delay affecting completion and compensation for the extra and additional Cost incurred as a consequence of the existence of adverse unforeseeable physical conditions and the measures which were taken to overcome the problems caused by these adverse soil conditions.

[157] The arbitral tribunal then proceeded to examine the plaintiffs' notice of termination, starting first with the 'programme' ground because of 'its comparative narrowness' at paras 726–771 before dealing with the principal ground at paras 772–805.

[158] In relation to the 'programme' ground, the arbitral tribunal decided that '... the programme was not a proper basis upon which to attempt to determine the contract' (para 771); whilst in respect of the principal ground, it decided as follow:

803. In the view of the Tribunal, these matters not only fulfill the requirements of a 'reasonable excuse' but they also entitled Wayss to substantial extensions of time.

804. In the premises, there is no delay or lack of expedition on the part of Wayss which justifies or supports the JV's termination notice.

805. The JV's termination was wrongful. It amounted to a repudiation of the Contract. Wayss accepted that repudiation and is entitled in principle to the relief claimed.

[159] From the terms of the award, it is abundantly clear that the arbitral tribunal had properly ascertained and made numerous clear findings of fact which it was duty bound to make; that it had asked the right questions and considered the right aspects of the applicable law; identified the relevant contractual provisions in order to ascertain the intention of the parties; applied those considerations to the facts as ascertained before reaching its conclusions and decision.

[160] In matters of termination, the contractual provisions are important. So are the facts. Here, the award amply demonstrates the arbitral tribunal taking pains to understand various fundamentals; for instance the purpose of the contract and the project, the whole progress of the works under the contract as well specific and critical aspects of that progress and its impact and ramifications; the role of key persons in the project and the contract, the applicable law, just to name a few before making its determination. The court can find no error of law in this award; and no error in the reasoning of the arbitral tribunal. The award is in fact not wrong in law.

[161] When the whole award is considered, and as illustrated above, the court generally finds that the reasoning and deliberations of the arbitral tribunal including the matters that it took into consideration in addressing the issue of whether the termination by the plaintiffs was wrongful and amounted to a repudiatory breach of the contract so that the defendant could then accept and terminate the said contract, are all in accord with settled and trite principles of law. Contrary to the complaints of the plaintiffs, the award amply shows that it does not merit curial intervention at all.

[162] In dealing with the specific question of the validity of a termination of contract, aside from identifying the relevant provisions of the contract and making findings of the material facts and key events, the arbitral tribunal has to attribute blame between the parties. As pointed out, the arbitral tribunal was alert to this but was equally alert to the fact that it needed to consider subsidiary issues and material events relevant to specific aspects of the case before it could 'turn to the contract and the allocation of responsibility'. There is nothing improper or irregular in this effort. There is also nothing amiss when the arbitral tribunal inquired as to 'whether there was any substantive, as opposed to procedural, difference between the two routes' taken by the plaintiffs to terminate the contract. The arbitral tribunal was 'unable to identify any such difference'.

[163] These remarks are found at para 724 of the award. It is the court's view that there is nothing here that may be validly framed into a question of law for determination by this court. In the first place, when the arbitral tribunal posed this question to itself, it was out of concern as to whether any particular principles or criteria will have to be considered. As it was unable to identify any substantive difference because both routes were 'concerned with progress', it was proper for the arbitral tribunal to then decide that the 'same criteria apply to each'. The arbitral tribunal stated that 'It is to be presumed that while the programme issue might arise where the lack of expedition was absent, it seems that there must in either case be serious delay. If the failure to submit a complaint programme is a purely administrative hiccup, it is difficult to see why it would warrant a (good faith) termination — and it is important to bear in mind that both routes lead to that draconian remedy of termination'.

[164] Having recognised that termination is a draconian remedy, and it is, the arbitral tribunal gave this term a strict construction; an approach which is supported by case law. See for example the Federal Court's decision in *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597; the English Court of Appeal's decision in *Peregrine Systems v Steria Ltd* [2004] EWHC 275 and *Rice v Great Yarmouth Borough Council* [2004] App LR 6/30. The arbitral tribunal had obviously reasoned its decision very carefully, from not only appropriate but necessary perspectives. The court can find no wrong with such an exercise and determination.

[165] Therefore, it was perfectly in order for the arbitral tribunal to pose that question and then proceed to answer it by finding that there was no substantive difference between the two grounds for terminating the contract. The arbitral tribunal was perfectly entitled to say that both were related to the matter of progress. The arbitral tribunal's remarks must be read against the full factual matrix and proper context. Once that it is done,it will be readily seen that the plaintiffs' concerns are not only misplaced but, unfounded.

[166] Further, it was open to the arbitral tribunal to find that the termination of the contract was not justifiable on either of the plaintiffs' two grounds without more and that proof of serious culpable delay was required. Whether delay is of itself sufficient to raise an inference of lack of due diligence must surely depend on the circumstances. In that regard, the whole contractual context must be evaluated. Delay in itself is not like the case of night following day; that it is necessarily to be equated with a breach of obligation leading to the right to terminate.

[167] The fact that the defendant failed to complete the works in time is not conclusive evidence of a failure to proceed with due expedition and without

delay. It is evidence of default, certainly at the prima facie level. But, for the purposes of determining whether that delay or non-completion by a date agreed is in itself evidence of want of due expedition and without delay and for which then there is this accompanying right to terminate the contract, the terms of the contract needed more to be established. The court agrees that acontractor such as the defendant who has failed to complete on time may still be found to be proceeding with due expedition and without delay if the contractor or the defendant makes serious efforts to overcome the difficulties encountered at site. It is certainly correct when the arbitral tribunal opined that delay or non-completion is only one of the aspects or parameters which is taken on board in determining whether the defendant has failed to proceed with due expedition and without delay.

[168] There is ample case law in support; amongst which are *Westminster City Council v J Jarvis & Sons Ltd* [1970] 1 WLR 637 which was followed in *Hometeam Constructions Pty Ltd v Mc Cauley* (2005) NSWCA 303; as well as the decisions in *Dura Construction Pty Ltd v Hue Boutique Living Pty Ltd (No 3)* [2012] VSC 99 and *Blackbear (NT) Pty Ltd v Want & Another* [2013] NTSC 55. The court does not feel it necessary to go into detailed deliberations on these cases. With respect to the plaintiffs, the court cannot find anything wrong or obviously wrong with this interpretation of the law and the application of the law to the material facts.

[169] Precisely for these right reasons and legal principles, the arbitral tribunal proceeded to examine the material aspects faced and the steps taken by the defendant in particular in dealing with the difficulties encountered. The contents of the award show the arbitral tribunal conducting precisely the right exercise of evaluating the factual matrix, evaluating the circumstances relating to the delay, and the interplay of the various events before coming to its findings.

[170] Specifically, in an issue of termination by reason of failing to proceed with due expedition and without delay, it is perfectly in order to consider the whole progress of the works and what were the reasons or excuses put forth by the defendant. Where there was more than one delay or cause for the delay, it was open to the arbitral tribunal, in law and on the facts to consider and attribute the degree of blameworthiness; all this in answer to the immediate question of whether there was reasonable excuse. Specifically, the findings relate to the progress of the works under the said contract, what exactly were the causes of delay in the project.

[171] The arbitral tribunal pinned the autumn of 2005 or September 2005 as the relevant turning point or watershed in the history of the defendant's

involvement with the said contract, making specific findings of fact on matters or events prior to and from the month of September 2005; including the following:

(a) in respect of section A, that although the defendant may have been liable to pay 'a very modest liability for liquidated damages' on account of delay prior to September 2005, there was nothing of any weight in the context of an allegation of failing to proceed with due expedition and without delay — para 746;

(b) in respect of the drive out from section A, that the defendant 'dealt professionally with the consequences of this incident since the engineer had no contemporaneous complaint — at least in substance — until the revised programme arrived and fell to be discussed' — para 748;

(c) that there was no lack of expedition on the part of the defendant which justified or supported the plaintiffs' termination notice — para 804;

(d) that the plaintiff was responsible for the delay and that it was this delay that had caused the project to 'go pear-shaped';

(e) that there would have been no termination but for the events from September 2005 — para 756;

(f) that the defendant had complied with the claims procedure when claiming for an extension of time;

(g) that the defendant's notices for an extension of time met the requirements under the contract — para 722; and

(h) that the plaintiffs did not attempt to terminate the contract on account of the pre-September 2005 delays at the time when these delays arose;

[172] It is evident from the award that although the arbitral tribunal concluded that the defendant was responsible for the early delay to the project or delay prior to September 2005, this delay was not material when compared to the delay from September 2005 onwards and for which the plaintiffs were responsible.

[173] More significantly, and this is important to the argument that the challenge is actually an academic exercise are these specific findings by the arbitral tribunal that the plaintiffs did not terminate the said contract on events prior to September 2005; that it was the delay from September 2005 onwards which was what caused the project to 'go pear-shaped'; and that the plaintiff never intended to terminate by reason of the delay that had occurred prior to September 2005. Seen now in its full context and read in a coherent and reasonable manner, the court agrees with the defendant that the questions of law posed are actually academic and irrelevant because the arbitral tribunal did

not reach its decision based on the purported matters raised by the plaintiffs. The arbitral tribunal actually came to its conclusion that the plaintiffs' termination was wrong based on factual findings which this court is in no position to say any differently as the arbitral tribunal is the sole arbiter of the facts. On those key findings of facts, what is obvious and cannot be ignored, is this single but most critical fact — that not only do those findings bind the plaintiffs, the plaintiffs do not challenge them even here in these proceedings.

[174] In the face of unchallenged facts and findings of issues, it cannot be said that the rights of the plaintiffs are affected substantially, or at all. The court agrees with the defendant that real and genuine questions of law must at the same time, accommodate and be consistent with these key findings of fact. When it cannot change or affect those other key findings, it can only be said that the questions do not affect the rights of the plaintiffs in any way since the plaintiffs' rights remain affected by those other unchallenged findings.

CONCLUSION

[175] The court therefore agrees with the defendant that the requirements of s 42 have not been satisfied for the reasons offered by the defendant. As the test in s 42 is somewhat narrow and restrictive primarily because of the scheme of the whole Act (ss 8, 37, 38, 39 and 42), the court must be convinced that this is a suitable case for intervention. The court is not at all convinced.

[176] For all the reasons discussed, the application must be dismissed with costs. In the matter of costs, the parties have proposed a sum of RM75,000 as reasonable and appropriate. With the numerous issues and voluminous documents and the complexity of issues and sub-issues, the court agrees that the sum proposed is suitable and it is so ordered.

Application dismissed with costs.

Reported by Kanesh Sundrum